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Ch. H. F. Pariel,
Attorney at Law,
Quincy, - - Cal.

A TREATISE

ON

THE RULES

FOR THE SELECTION OF THE

PARTIES TO AN ACTION

BY

A. V. DICEY, Esq

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

WITH NOTES TO AMERICAN CASES

BY

J. HENRY TRUMAN, Esq

OF THE CHICAGO BAR

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PREFACE

TO THE AMERICAN EDITION.

The number of law books each year presented to the attention of the profession is really so enormous that the propriety of adding yet a further one, new either in form or composition, to the mass, is a matter of serious consideration, and its advent is an event almost commanding an apology; but in this case the topic, and the thorough way in which the author has treated it, as well as the high opinion it has won from the profession in England should recommend it both to students and practitioners, and should secure it a favorable reception. As the author has himself said of the work he had undertaken, he aimed to gather under the head of general rules, the established doctrines and decisions concerning Parties to Actions—and to concentrate in one work what was scattered through many and as he aimed, he has done.

The editor of the present Edition undertakes none but the simple task of filling out the lines when

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our own practice, or late decisions, have caused them to deviate from the general rules in force, in American courts, trusting with so good a foundation, the work may be found useful and reasonably complete.

J. H. T.

PREFACE

TO THE ENGLISH EDITION.

The aim of this treatise is to reduce or digest the law of parties into a series of rules, each of which is illustrated and explained by appropriate cases and examples, and confirmed, wherever this is possible, by quotations from judgments, or from the pages of writers of acknowledged reputation. In the explanatory portions of the text will be found, it is hoped, all the most important decisions or enactments bearing on each point under consideration; so that any person who wishes not only for a rule but also for an account of the cases or statutes on which it rests, may obtain the information which he requires; and care has been taken to employ, even at the cost of some circumlocution or occasional awkwardness of expression, the *ipsissima verba* either of Judges or of eminent writers, so that the statements made may carry a weight which can not attach to a summary of the law given in the words of an unknown author.

The labors of Mr. Chitty, Mr. Broom, and Mr.

Justice Lush, have, it is scarcely necessary to say, greatly facilitated the production of this work, but have, it is hoped, not necessarily rendered it either useless or superfluous; inasmuch as all of these distinguished authors aimed rather at stating the law of parties than at reducing it to a systematic form; whilst both Mr. Chitty and Mr. Justice Lush were compelled from the scheme of their works to treat this branch of the law as merely subsidiary to the law of "practice," and were therefore precluded from its full and systematic treatment.

The practical advantage of the arrangement pursued in this treatise is, that it enables the reader to see at a glance what the rule of law is; whilst it frees him from the necessity of collecting the principle for which he is in search from the decisions or statutes in which it is embodied; and that it further puts it in his power to refer with great readiness to the part of the subject on which he may desire to be informed. An advantage of a more speculative nature is that this arrangement exhibits the law of parties as a whole, and by showing the relations between its different parts, makes, it is hoped, apparent the fact that this somewhat complicated and intricate branch of the law, depends upon and is the expression of a few simple principles.*

Some persons may think, and not unreasonably, that the present time is inopportune for a systematic consideration of the law of parties, inasmuch as the

* See chapter III., marg. pp. 28–77

fusion of common law and of equity, which can not be much longer delayed, will assimilate the maxims of common law to those which govern proceedings in courts of chancery, and will therefore tend to the modification or repeal of many among the more technical precepts embodied in this treatise; yet this period of approaching change affords in reality, it is submitted, an appropriate time for an examination into the rules which regulate an action at law. A fusion of law and equity, while it must end by modifying two different systems of procedure, will bring into great prominence the rules which govern the choice of plaintiffs and of defendants. A conjecture may indeed be hazarded, that a vast number of the rules of common law will, as being founded on the dictates of justice and of common sense, survive under slightly different shapes, in the law which will be administered by the proposed High Court. But whether this anticipation prove correct or not, it is certain that whenever a court is founded which shall be at once a court of common law and of equity, a knowledge of the rules which now regulate the choice of parties in an action, and of the principles on which they depend, will for the purpose of dealing with the many questions which must arise in the course of the revolutions in our legal system, become of the highest importance, no less to the practical than to the speculative lawyer. If versed only in the proceedings at common law he will need clearly to seize the principles on which such proceedings rest, in order that he

may understand how far and in what direction they are modified by the rules of courts of equity. If, on the other hand, he is practically acquainted only with proceedings in Chancery, he will require to grasp the bearing and nature of technical rules of which he has hitherto had no experience. If the present treatise shall in any measure facilitate the comprehension of the principles on which the law of parties rests, it will have attained its object, and, it is hoped, have justified its publication at the present time.

A. V. D.

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PARTIES TO ACTIONS.

CHAPTER I.

THE PERSONS WHO CAN SUE AND BE SUED.

RULE 1.—All persons can sue and are liable to be sued in an action at law.

The general principle of law is, that "as the law grants redress for all injuries, and gives a remedy for every kind of right, so it is open to all kinds of persons, and none are excluded from bringing an action." (*a*)

Hence, subject to the exceptions afterwards mentioned, (*b*) persons of all descriptions, of whatever rank, condition, age, or country, are able to sue, and are liable to be sued.

The sovereign can sue as a common person in respect of causes of action accruing to him in his individual character; (*c*) the Queen Consort can bring or defend an action as a feme sole. (*d*) [1]

(*a*) Bac. Abr., Action, B.

(*b*) Each rule is laid down in the form of an absolute statement, but must be understood as subject to the exceptions afterwards enumerated; the scheme of this treatise being to lay down in each case, first the general rule, and then the exceptions to it. The rules are for the sake of easy reference numbered consecutively, without any regard to their comparative importance.

(*c*) Com. Dig., Action, B. 1.

(*d*) Com. Dig., Action, B. 2; Coke, Lit., 33 a.

[1] In King of Spain v. Oliver, 2 Wash. C. C. 43, 2, the circuit court refused to decide on motion, as improper, the

A foreign sovereign is entitled to sue in our courts
[2] for breaches of contract, (*e*) or for wrongs done to him by English subjects, without authority from the English Government, in respect of property belonging to him either in his individual or in his corporate capacity; but he can not maintain a suit here for invasions of his prerogative rights as reigning sovereign. (*f*) Corporations, married women, infants, idiots, lunatics, and aliens, can sue and be sued.[1]

Exception 1.—Felons, outlaws, and alien enemies can not sue.

A person convicted of felony becomes incapable of suing at law or in equity, and remains under this disability until either he has obtained a pardon or his term of punishment has expired. (*g*)

A felon (unless he receives a free pardon containing words of restitution) can not, generally, on his disability being removed, sue for causes of action which have

(*e*) Emperor of Brazil v. Robinson, 6 A. & E. 801.

(*f*) Emperor of Austria v. Day, 30 L. J. 690, Ch.; 3 De Gex, F. & J. 217; Mostyn v. Fabrigas, v. Smith, L. C., 6th ed., 663.

(*g*) Whitaker v. Wisbey, 12 C. B. 44; 21 L. J. 116, C. P.; Bullock v. Dodds, 2 B. & Ald. 258; Coke, Litt., 390 b; Addison, Contracts, 6th ed., 1023. By a conviction of felony the goods and chattels of the felon are immediately forfeited to the Crown; by attainder which follows on judgment given, his lands and tenements are forfeited. Bullen, Pleadings, 3rd ed., 556

question whether a suit could be supported in the name of the "King of Spain," by Ferdinand VII., before he had been recognized by the United States as king. The Priest of the Mission Dolores may, in his character as priest, maintain in his own name an action to recover possession of the mission lands. Santillan v. Moses, 1 Cal. 92. A foreign republic, acknowledged as such by the government of the United States, may sue in our courts. Republic of Mexico v. De Aragonez, 5 Duer, 634.

[1] And so it has been held that a certain number of persons belonging to a voluntary society, having a common interest in the society, may sue in equity in behalf of themselves and their associate members of the society, for purposes common and beneficial to them all. Beatty v. Kurtz, 2 Pet. 566.

accrued, or which depend upon contracts made with him at any time before such removal.

But though this is true as a general rule, a person convicted of felony may, on his capacity to sue being restored, in some cases sue on contracts made with him, or for wrongs done to him before his disability ceased.

Inasmuch as his freehold land is not transferred to the Crown until office found, (*h*) he may sue, unless the Crown interfere to prevent him, on contracts (*e. g.*, for the payment of rent, or to repair) connected with his freehold property, and may bring ejectment, even though attainted of felony, when there has been no office found on behalf of the Crown; (*i*) and perhaps he [3] may sue for injuries done to his freehold property.[1]

He may also sue for any personal wrong done to him before or after the commencement of the period of his disability, *e. g.*, for an assault. (*k*)[2]

An outlaw can not, while his outlawry lasts, come into court for any other object than to apply to have his outlawry reversed or set aside, (*l*) and can not, therefore, bring an action as long as his disability continues. (*m*)

An outlaw is restored, on the reversal of his outlawry,

(*h*) Kynnaird v. Leslie, L. R., 1 C. P. 389; 35 L. J. 226, C. P.; Addison, Contracts, 6th ed., 1024.

(*i*) Cole, Ejectment, 573. Doe d. Griffith v. Pritchard, 5 B. & Ad. 675.

(*k*) Bernard's case, Owen, 22; Com. Dig., Forfeiture, B, 2.

(*l*) Coke, Litt., 128 a.

(*m*) Addison, Contracts, 6th ed., 1024.

[1] In New York, a person convicted and attainted of felony, prior to March 29, 1799, is not civilly dead so as to divest his estate, and after a pardon, he may maintain an action concerning an estate holden by him prior to conviction. Platner v. Sherwood, 6 Johns. Ch. 118. But a pardon will not operate to annul the sale of the felon's property by persons appointed to administer on his estate, nor divest the interest of his heirs therein acquired by his civil death. Matter of Deming, 10 Johns. 232; Id 483.

[2] But the pardon, in that State at least, will not operate to annul a second marriage of his wife. Matter of Deming, 10 Johns. 232; Id. 483.

to all his rights, (*n*) and stands in the same position as if he had never been outlawed. (*o*)[1]

An alien enemy can not, during the continuance of war, unless under the license or protection of the Crown, (*p*) bring an action, or continue an action commenced before the war began. (*q*) Under the term alien enemy are included not only the subjects of any state at war with us, but also any British subjects or the subjects of any neutral state voluntarily residing in a hostile country.[2]

British subjects detained prisoners abroad are not alien enemies, (*r*) and in one case, a person held as a

(*n*) Com. Dig., Outlawry, C. 5.

(*o*) Ibid., and St. John's College v. Murcott, 7 T. R. 259.

(*p*) Wells v. Williams, 1 Salk. 46.

(*q*) Le Brett v. Papillon, 4 East, 502; Alcinous v. Nigreu, 4 E. & B. 217; 24 L. J. 210, Q. B.

(*r*) Antoine v. Morshead, 6 Taunt. 237; Daubuz v. Morshead, 6 Taunt. 332.

[1] So, after pardon from the state's prison, where he was sentenced for life, a convict is entitled to the custody of his children. Matter of Dening, 10 Johns. 232; Id. 483. The pardon of a man convicted of fornication and bastardy discharges him from all liability for costs or for the maintenance of his bastard child; Commonwealth v. Ahl, 43 Pa. St. § 3; and an execution for fine and costs against one pardoned is void; Blanchard v. State, Wright (Ohio) 377; and as to the extent to which a pardon relieves from actions for fines, costs and penalties, and liabilities for fees of prosecuting officers, informers, &c., see Anglea v. Commonwealth, 10 Gratt. 696; Fugate's Case, 2 Leigh, 724; Rowe v. State, 2 Bay, 565; Commonwealth v. Hitchman, 46 Pa. St. 357; Same v. Ahl, 43 Id. 53; Schuylkill v. Reifsnyder, 46 Pa. 446; Commonwealth v. Bush, 2 Duval, 264; Routt v. Feemster, 7 J. K. Marsh. 131; Rucker v. Bosworth, Id. 645; State v. Farley, 8 Blackf. 229; Commonwealth v. Shisler, 2 Philadel. 256; United States v. Athens Armory, 35 Ga. 344; Holliday v. People, 10 Ill. (5 Gilm.) 214.

[2] But the fact that one of the plaintiffs, who is a mere nominal party to the suit, is a public enemy, is not ground sufficient for dismissing the petition of the only beneficial plaintiff, who is not an enemy. Hoskins v. Gentry, 2 Duv. (Ky.) 285.

prisoner of war in this country was allowed to sue upon a contract for services rendered by him whilst a prisoner. (*s*)

The disability of an alien enemy ceases on the restoration of peace; (*t*) and though no action can be brought on contracts made with him during the time of war, an alien, whose country has been at war with our [4] own, can, on the restoration of peace, bring an action on a contract (*u*) made or for a wrong done before the commencement of the war. (*v*) [1]

The disabilities of an alien enemy are less than they at first sight appear. "On declaring war, the king usually, in a proclamation of war, qualifies it by permitting the subjects of the enemy resident here to continue so long as they peaceably demean themselves, and without doubt such persons are to be deemed alien friends in effect; (*y*) and though an alien should come here after the war commenced, yet, if he has been commorant here by the license of the king ever since, he may clearly maintain an action." (*z*) [2]

(*s*) Sparenburgh v. Bannatyne, 1 B. & P. 163.

(*t*) Harman v. Kingston, 3 Camp. 150, 152; Flindt v. Waters, 15 East, 260.

(*u*) Provided that the Crown has not interfered to seize the debt, Flindt v. Waters, 15 East, 260.

(*v*) Harman v. Kingston, 3 Camp. 150, 152; Flindt v. Waters, 15 East, 260.

(*y*) Coke, Litt., 129 b, note by Hargreave.

(*z*) Williams, Exors., 6th ed., 222.

[1] But a pardon will not relieve one from his civil responsibility for acts of trespass committed while in rebellion. Hedges v. Price, 2 W. Va. 192.

[2] A general act of amnesty and pardon must be recognized by courts the same as any other public law, nor can the benefit of it be waived by individuals who come within it. State v. Blalock, Phill. (N. C.). But a special pardon must be judicially brought before the court. United States v. Wilson, 7 Pet. 150, L. 242. An amnesty act, however, which relieves from civil liabilities for private wrongs, is unconstitutional and void. Terrill v. Rankin, 2 Bush. 453; see Haddix v. Wilson, 3 Id. 523; Hedges v. Price, 2 W. Va. 192; State v. Kieth, 63 N. C.

To an action for breach of contract by two or more persons, it is a defense that one of them is a felon, an outlaw, or an alien enemy ; (*a*) and it is said, that if the cause of action be capable of severance, as an injury done to a joint chattel, (*b*) the plaintiff, who is not a felon, &c., may recover for his share of damages in spite of the disability of his co-owner.

Felons, outlaws, and aliens, can sue as executors, administrators, (*c*) or trustees, and on all occasions where they do not sue in their own right.

Felons, outlaws, and aliens are liable to be sued.

Exception 2.—The sovereign, foreign sovereigns, and ambassadors can not be sued.

The king can not be made defendant in an action.
[5] Redress must be sought for, if it is obtainable at all, by a petition of right. (*d*)

A foreign sovereign clearly can not be sued in the courts of this country for any act done by him in the character of a sovereign prince ; (*e*) and it would appear most probable that he can in no case be made defendant in an action. (*f*)

(*a*) Com. Dig., Abatement, E. 2.

(*b*) Lush, Practice, 3rd ed., 5.

(*c*) Caroon's case, Croke, Car. 9 ; Brocks v. Phillips, Croke, Eliz. 683, Coke, Litt., 128 b ; Kynnaird v. Leslie, L. R., 1 C. P. 400 ; 35 L. J. 226, C. P.

(*d*) Canterbury's case, 1 Phil. 322 ; and Com. Dig., Action, C. 1.

(*e*) Duke of Brunswick v. King of Hanover, 6 Beav. 1 ; 2 H. L. 1 ; Wadsworth v. Queen of Spain, 17 Q. B. 171 ; 20 L. J. 488, Q. B.

(*f*) But see Munden v. Duke of Brunswick, 10 Q. B. 656 ; 16 L. J. 300, Q. B. Westlake, Private International Law, ss. 135–139

140. A full pardon, or amnesty by the president, remits so much of a penalty as is due to the United States. Armstrong's Foundry, 6 Wall. 766. The oath required by an act of congress of July 2, 1862, to be taken before an attorney can be admitted to practice before the courts of the United States, can not be exacted from one who has received the pardon of the president for all offenses "arising from participation, direct or implied, in the rebellion." *Ex parte* Garland, 4 Wall 333.

A public minister (*g*) accredited to the Queen by a foreign state, is privileged from liability to be sued here in civil actions, (*h*) and hence such a minister has been held not liable to be sued for calls due to a company of which he was shareholder; (*i*) nor would it seem can he be sued for a tort, *e. g.*, an assault.[1]

(*g*) Magdalena Steam Nav. Co. v. Martin, 2 E. & E. 94; 28 L. J. 310, Q. B.

(*h*) Magdalena Steam Nav Co. v. Martin, 2 E. & E. 115; 28 L. J. 310, Q. B.

(*i*) Ibid.

[1] By subdivision eighth of § 711 of the Revised Statutes of the United States, revision of 1863, the jurisdiction "of all suits or proceedings against embassadors, or other public ministers, or their domestics or domestic servants, or against consuls or vice-consuls, is vested in the federal courts." See United States v. Ravard, 2 Dallas, 297; Cohens v. Virginia, 6 Wheat. 407; Davis v. Packard, 7 Pet. 276; St. Luke's Hospital v. Barkley, 3 Blatchf. 259; United States v. Ortega, 11 Wheat. 467. Section 687 of the revision cited, enacts that "the supreme court (of the United States) shall have exclusively all such jurisdiction of suits or proceedings against embassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations, and original but not exclusive jurisdiction of suits brought by embassadors or other public ministers or in which a consul or vice-consul is a party."

CHAPTER II.

THE DIVISION OF ACTIONS.

ACTIONS are of different kinds, and can be classed or divided on various principles. (*a*)

They can be divided,—firstly, according as they are actions on contract (called also actions ex contractu), or actions for a wrong or tort (called also actions ex delicto), under which main classes they can be again subdivided according to what are called their forms;—secondly, according as they are transitory or local.

The most important division is that into actions on contract, and actions for tort.

(A) *Actions on Contract and Actions for Tort, or Actions* ex contractu *and Actions* ex delicto.

The maintenance of an action depends upon the existence of what is termed a "cause of action," *i. e.*, of a right on the part of one person (the plaintiff), combined with the violation of, or infringement upon, such right by another person (the defendant). Thus, if A. enters into a contract with X. for the supply of goods by X. to A., and X. does not supply the goods, or if X. wrong-
[7] fully imprisons A., A. has in either case a "cause of action" against X. In the first instance A. has

(*a*) An old division is that into real actions, *i. e.*, actions brought for the specific recovery of lands, tenements, and hereditaments; personal actions, *i. e.*, actions brought either for the specific recovery of goods, or for the recovery of debts, or of damages in compensation for a breach of contract, or any other injury; and mixed actions, *i. e.*, actions appertaining in some degree to both of the former classes. All the actions treated of in this treatise are, with the exception of Ejectment, personal actions.

Ejectment, which may be considered a mixed action, is treated of separately. See Chap. XXXIII.

a right to have the contract performed by X., and there has been a violation or infringement upon this right in consequence of the non-performance or breach of the contract by X. In the second instance A. has a right to his personal liberty, and there has been a violation or infringement upon this right, through the imprisonment of A. by X. There goes, it should be noticed, to make up the cause of action at once the "existence" and the "violation" of a right, and the expression "cause of action" means (in strictness) the whole cause of action, *i. e.*, all the facts which together constitute the plaintiff's right to maintain the action. (*b*) This should be noticed, because, whilst the expression "action on contract" directs attention to the right only as the foundation of the action, the expression "action for tort" directs attention to the "infringement" of the right only as the foundation of the action, and because the expression "cause of action" is sometimes less accurately (*c*) used as meaning one part only of the cause of action, *sc.*, the violation of, or the infringement upon, the plaintiff's right.

In each of the supposed cases (*sc.*, of an action for the non-delivery of goods, and of an action for false imprisonment), there exists a right on the part of the plaintiff; but his right is in each instance of a different character. In the first case, A.'s right is a right against X. only, and depends solely on the existence of a contract between him and X. In the second case, A.'s right, *sc.* not to be deprived of his personal liberty, is a right against X.; but it is also a right possessed by A. against the world generally, and it is further a right independent of the existence of any contract between A. and X. The first right is a right dependent upon the existence of a contract. The second right is independent of the existence of any contract. Upon [8] this difference depends the distinction between actions on contract and actions for tort.

(*b*) See Allhusen v. Malgarejo, L. R., 3 Q. B. 340; 37 L. J. 169, Q. B.; Sichel v. Borch, 2. H. & C. 954; 33 L. J. 179, Ex.

(*c*) Slade v. Noel, 4 F. & F. 424; Life v. Round, 6 W. R. 283.

1. *Actions on Contract, or* ex contractu.

An action on contract is an action brought for the non-performance or breach of any contract or promise, whether expressed or implied, whether made by deed, simply in writing, or by word of mouth. An action on contract, though said to be brought on the contract, because a contract must exist as the basis of it, is, strictly speaking, an action for the breach of a contract. And, in order to maintain the action, it is no less necessary that a contract should be broken than that it should exist. This holds good whatever be the nature of the contract sued upon, *e. g.*, whether it be a promise to pay for goods supplied or a covenant by deed to pay rent.

In the case of a debt, *e. g.*, for goods supplied otherwise than on credit, an action can, it is true, be brought immediately that a debt is incurred, *i. e.*, on the delivery of the goods, and without any demand upon the debtor for payment. The explanation of this is, that in the case of such a debt the law considers the agreement to be (in the absence of any special terms) to pay the debt immediately, and the mere non-payment constitutes a breach of contract.

In a covenant, on the other hand, there is generally a time fixed for the performance of the covenant, and until this time has arrived, an action for its non-performance can not be brought. But in either case no action can be brought on the contract unless and until a breach of the contract has occurred. (*d*) [1]

(*d*) Com. Dig., Action, E. A case such as Hochster v. De la Tour, 2 E. & B. 678, 22 L. J. 456, Q. B., where a person engaged to enter into an employment in June, was held entitled to commence in May an action against his proposed employer for announcing his resolution not to employ him, is not in reality inconsistent with this statement, since the defendant was held to have broken his contract by the refusal to employ the plaintiff.

[1] And the right of action follows the interest. Townsend v. Townsend, 5 Harr. (Del.) 127; Stoddard v. Mix, 14 Conn. 12.

2. *Actions for Tort, or* ex delicto

An action for tort is an action for a wrong inde- [9]
pendent of contract, (*e*) *e. g.*, for an assault, imprisonment, fraudulentmisrepr esentation, &c. In other words, a wrong or a tort is a violation by one person of any of the rights (*e. g.*, the right to personal liberty) possessed by another person independently of any agreement with the wrong-doer, and an action for a wrong or a tort is an action on account of the violation of, or interference with, such rights. (*f*)

Hence, to the maintenance of an action for tort, two things are necessary. In the first place, there must exist a "right" on the part of the plaintiff, independently of any agreement between him and the defendant. This corresponds to the right existing by contract, which forms the basis of an action on contract. In the second place, there must exist on the part of the defendant a violation of, or interference with, this right of the plaintiff. This corresponds with the breach of contract in an action on contract.

Thus an action for an injury done to the plaintiff by the careless driving of the defendant, depends upon the right of the plaintiff (independently of any contract) not to be injured by the negligence of the defendant, and upon the violation of such right through the carelessness of the defendant.

Incidents of Actions on Contract and Actions for Tort.

There are several leading distinctions (affecting the choice of parties) between actions on contract and actions for tort, which, though considered at length [10]

(*e*) See C. L. P. Act, 1852, Sched. B.

(*f*) A right conferred by contract may be either a positive right, *i. e.*, a right to have a thing done, *e. g.*, to have a house built—or a negative right, *i. e.*, to have something not done, *e. g.*, not to be hindered from passing over a certain piece of land: a right independent of contract is in almost every case a negative right, *e. g.*, not to be assaulted, not to be defrauded, &c.

in different parts of this treatise, may be here pointed out generally.

The chief of these differences are as follows:—

1. No one can sue or be sued for the breach of a contract who "is a stranger to the contract," or, as it is sometimes expressed, "is not privy to the contract." What is meant is, that the person to sue for the breach of a contract must be the person with whom the contract is in the eye of the law made, and that no one can sue for the breach of a contract not made with him, simply on the ground that he is injured by the breach. (*g*) Any person, on the other hand, who is injured by a wrongful act, may bring an action for tort against the wrong-doer, even though the injury be an indirect one, as where a master is injured in consequence of an injury done to his servant. (*h*) The same act, moreover, may result in an interference with the separate rights of an indefinite number of persons, or in other words, be the cause of many torts, (*i*) *e. g.*, the careless act of an engine-driver may cause separate injuries or torts to an indefinite number of passengers.[1]

From the fact that the same act may constitute a tort to an indefinite number of persons, it follows that while the person or persons to sue for a breach of contract must be a definite person or definite persons ascertainable before the contract is broken, the number of persons who may have separate rights of action against a wrong-doer for the same tortious act is indefinite and unascertainable before the commission of such act.

[11] 2. In an action on contract, all the persons with

(*g*) Winterbottom v. Wright, 10 M & W. 109; 11 L. J. 415, Ex., Rule 10.

(*h*) Compare Alton v. Midland Rail. Co., 19 C. B., N. S., 213; 34 L. J. 292, C. P.

(*i*) See Scott v. Shepherd, 1 Smith, L. C., 6th ed., 422–423, judgment of GOULD, J., "Whenever a man does an unlawful act he is answerable for all the consequences."

[1] Townsend v. Townsend, 5 Harr. (Del.) 127; Stoddard v. Mix, 14 Conn. 12. Nor can individuals proceed in equity to enforce purely public rights. Smith v. Heuston, 6 Ohio, 101.

whom the contract is (in the eye of the law) made, should join as plaintiffs, since A. can not recover damages for the breach of a contract made with A. and B.

In an action for tort, on the other hand, it is frequently a matter of choice whether the persons injured should sue separately or jointly, and in any case the non-joinder of a plaintiff is a matter of comparatively small importance. For, if in such an action, where A. and B. ought to sue jointly, A. sues alone, he may, it is true, be forced (by a plea in abatement) to join B. with him. But if the non-joinder of B. is not objected to at the proper stage of the proceedings before the trial, A., though it may appear that B. ought to have been joined, will recover damages in proportion to the injury which he himself has suffered, and no objection can be taken to a subsequent action by B. alone for the injury which B. has sustained. (*k*)

In other words, a contract with A. and B. jointly is a different thing from a contract with A. alone, and it is an answer to an action by A. that the contract sued upon was a contract, not with A., but with A. and B. But an injury to A. is no less an injury to him because it was an injury to A. and B. jointly. Hence, if A. sues alone for an injury, *e. g.*, to the joint property of A. and B. (though it may be possible by proper pleading to compel A. to join B. with him as plaintiff), it is no answer to the action by A. for the injury to him that the tort committed was a tort against A. and B. jointly. (*l*)

3. In an action on contract, all the persons by whom the contract was made should, properly speaking, be joined as defendants, *i. e.*, joint contractors should be sued jointly for a breach of contract, and it is an error to sue X. alone for the breach of a contract made by X. and Y. jointly. The error is, however, of minor importance, since, though the defendant, X., can by [12] proper pleading (*i. e.*, by a plea in abatement) compel the plaintiff to make Y. a co-defendant, still, if the objection be not taken at the proper stage of the proceed-

(*k*) Addison v. Overend, 6 T. R. 766; Sedgworth v. Overend, 7 T. R. 279.
(*l*) See Chapter XXXIV., as to non-joinder of plaintiffs.

ings before the trial, X. will be held liable on the joint contract of X. and Y. (*m*)

In an action for tort, no objection whatever can be made to the non-joinder of a joint wrong-doer as defendant.

In other words, joint contractors are jointly liable, but a wrong-doer is always separately liable for his torts, even though another person may be liable with him; hence, in an action against X. alone on a contract made by X. and Y., it is an objection that the action ought to have been brought against X. and Y. jointly. But to an action for tort against X., it is no objection whatever that the wrong complained of was committed by X. and Y. jointly, since X. is none the less responsible for a tort because Y. also happens to be responsible.

4. In an action on contract, the misjoinder of defendants is, unless amended, a fatal error, *i. e.*, a contract by X. and Y. is a different contract from one by X. alone, and if an action be brought against X. and Y., on a contract made by X. only, the action will fail.

On the other hand, the misjoinder of defendants in an action for tort is of small importance, *i. e.*, if X. and Y. be sued jointly for a tort committed by X. alone, a verdict will be found against X., and in favor of Y., and it will be no defense to X., that though he is guilty of a wrong, Y. is not guilty. (*n*)

5. A woman is not liable for, and can not be sued on, contracts made by her during coverture, and no person is, as a general rule, responsible for or liable to be sued on contracts made during infancy; but married
[13] women and infants are in general responsible and liable to be sued for torts committed by them. (*o*)

The distinction between an action on contract and an action for tort is in itself clearly marked, but the distinction,

(*m*) Rice v. Shute, 1 Smith, L. C., 6th ed., 511.

(*n*) For the effect of non joinder, misjoinder, and the amendment of these errors, see Chapter XXXIV.

(*o*) In the superior courts, in an action on contract, a verdict for more than £20 carries costs; but in an action for tort, a verdict for more than £10 carries costs. 30 & 31 Vict. c. 42, s. 5.

and the differences which follow from it, will not be found to apply to all the actions which are counted under the one or the other class.

This arises from the existence of certain actions, which in form are actions on contract, but are not really brought for the violation of rights conferred by contract; and of certain actions which in form are actions for tort, but are not in reality brought for the violation of rights independent of contract. The first class consists of actions for the breach of what is called an "implied contract," and which are sometimes termed actions "quasi ex contractu." The second class consists of actions for what are called "torts founded on contract."

There are only "two kinds of common law actions; one for injury to person or property, and the other for breach of contract. Now, the ordinary case of breach of contract is where both parties have agreed to a certain thing, and one breaks the promise which he has made. But for a long time implied contracts have been admitted into the law where a transaction having taken place between parties, a state of things has arisen in reference to it which was not contemplated by them, but is such that one party ought in justice and fair dealing to pay a certain sum of money to the other." (*p*) The essence of an action on an "implied contract" (*q*) is that it is brought [14] on account not of any actual contract, but of some transaction in virtue of which, though there has been no contract between the parties, one party ought to pay money to another as if there were a contract, whence the action may be termed an action "quasi ex contractu," *i. e.*, "as it were on a contract."

(*p*) Per MARTIN, B., Freeman v. Jeffries, L. R., 4 Ex. 199; 38 L. J. 121, Ex.

(*q*) The expression "implied contract" is used in several senses. In the sense in which the term "implied contract" is here used, an action on an implied contract nearly corresponds with an action quasi ex contractu, since that term is employed in Roman law to denote certain actions which may be brought where, as a matter of fact, there has been no contract between the parties, but where a state of things has arisen in which the law considers one of them bound to the other in the same manner as if a contract had been made.

One action of this class is what is called "an action for money had and received."

This is "a kind of equitable action to recover back money which ought not in justice to be kept. . . . . It lies only for money which, ex æquo et bono, the defendant ought to refund. . . . . It lies for money paid by mistake, (*r*) or upon a consideration which happens to fail, or for money got through imposition, express or implied, or extortion, or oppression, or undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant is obliged by ties of natural justice and equity to refund the money." (*s*)

The action for money received, which is of a very extensive character, and includes within it actions of very different kinds, is sometimes in reality an action on contract, since "contracts arising from agreement frequently result in a receipt and holding of money by the defendant for the use of the plaintiff, as for example, where the defendant has been engaged by the plaintiff as agent to receive money, and to account for and pay over the amount received, and has received money by virtue of his employment, and he is, therefore, bound by the terms of his engagement to pay over to the plaintiff the money received; but such money being in fact received and held by him for the use of his employer, his [15] liability may be concisely described as for money received by the defendant for the use of the plaintiff, without entering into particulars of the contract under which it was received." (*t*)

But it is more frequently an action "quasi ex contractu," and the supposed contract may be implied from an infinite variety of circumstances which this is not the place to enumerate.

(*r*) *Sc.* a mistake of fact, Milnes v. Duncan, 6 B. & C. 671; Marriott v Hampton, 2 Smith, L. C., 6th ed., 388.

(*s*) Per MANSFIELD, C. J., Moses v. Macfarlane, 2 Burr. 1012.

(*t*) Leake, Contracts, 47, 48.

The action may, lastly, depend on the existence of a distinct tort, since, in many cases, a person, by wronging whom a wrong-doer has gained money, may, if he prefers it, instead of suing for the wrong committed, bring an action for the money gained by the wrong, treating it as money received to his use. Thus, "take the case of a man selling the goods of another without authority, and receiving the proceeds of such sale. The law allows the party whose goods are so sold, to declare in an action for wrongful conversion, or, at his election, to sue on the implied promise to pay over the proceeds to him, though, in truth, there was no such promise." (*u*) This is one of the "cases in which the law has invented fictions to give a more convenient remedy to the party wronged." (*v*)

In this and other instances, (*y*) the action, which is in form an action on contract, and partakes of most of the incidents proper to such an action, may be considered as being in reality an action for tort, brought for convenience in the form of an action on contract.

The action also for "money paid" is, in many cases, one quasi ex contractu. When, for instance, A. is compelled to pay money which X. ought to have paid, A. may, under some circumstances, sue X. for the amount, as for money paid for X., though there is [16] no real agreement by X. to repay the money, and the action therefore can not, in substance, be considered an action for breach of contract.

Where one party to an action has obtained a judgment against another, he has a right, if he chooses, to bring an action on the judgment for the money due. This right arises from the existence not of a contract, but of a circumstance (*sc.*, the recovery of a judgment), which enables the plaintiff to sue the defendant as if there had been a contract between them, *i. e.*, it is a right quasi ex contractu.

(*u*) Compare 34 L. J. 297, C. P.

(*v*) Alton v. Midland Rail. Co., 19 C. B., N. S. 241; 34 L. J. 292, C. P., per WILLES, J. See Lythgoe v. Vernon, 5 H. & N. 180; 29 L. J. 164, Ex.

(*y*) Brewer v. Sparrow, 7 B. & C. 310.

"If a contract imposes a legal duty upon a party, the neglect of that duty is a tort founded on contract, so that an action ex contractu, for the breach of contract, or an action ex delicto, for the breach of duty, may be brought at the option of the plaintiff." (*z*)

"That there is a large class of cases in which the foundation of the action springs out of the privity of contract between the parties, but in which, nevertheless, the remedy for the breach or the non-performance is indifferently either assumpsit (*i. e.*, an action for breach of contract), or case upon tort, is not disputed. Such are the actions against attorneys, surgeons, and other professional men for want of competent skill in the services which they undertake to render; actions against common carriers, against shipowners on bills of lading, against bailees of different descriptions, and in numerous other cases in which the action is brought in tort or on contract, at the election of the plaintiffs." (*a*)

Actions, therefore, for torts founded on contract, are actions brought, not directly for a breach of contract, but indirectly for a breach of duty, arising from the existence of a contract. As being for a breach of duty, they are in form actions for tort. As being for the
[17] breach of a duty connected with a breach of a contract, they partake of the character of actions on contract.

It is clear that such actions must be in substance (whatever their form) either actions ex delicto or actions ex contractu. But some diversity of opinion has existed on the question to which of these classes they belong, and hence as to the further question by what rules they are to be governed, or, in other words, whether the incidents of actions on contract, or of actions for tort, rightly attach to actions for torts founded on contract. (*b*)

"The word duty," it has been said, "is introduced

(*z*) Addison, Torts, 3rd ed., 13.

(*a*) Boorman v. Brown, 11 L. J. 439, Ex. (Ex. Ch.), per TINDAL, C. J.

(*b*) In considering this question, it may be well to bear in mind that the greater number of such actions are actions against common carriers.

into this declaration [against a carrier for non-delivery], but let us see what is meant by the defendant's duty. How did he undertake any duty except by his agreement to carry and deliver the goods? The duty of a servant or the duty of an officer I understand, but the duty of a carrier I do not understand, otherwise than as that duty arises out of the contract. Suppose a man undertake to supply me as a builder with timber and with other materials for building. He imposes on himself the duty of performing his contract, but no other duty; and I may maintain an action against him for a breach of the contract, which in that sense will be a breach of duty. (*c*) . . . I suppose there can be no doubt that if a common carrier accepts goods to carry, and then dies, an action will lie against his executors. How is that? Why, because the action is founded on contract. But the form of the action can not alter the nature of the transaction. The form of the transaction is originally contract, and the circumstance of an action lying against the executors shows that it is so. How an action against the carrier on the custom ever came to be considered [18] an action in tort I do not understand, but it is so considered." (*d*)

So, in an action (*e*) by a master against a railway company, on account of an injury done to his servant when being carried by the company, the master was held not capable of suing, on account of the action being in substance an action on contract. In this case the law is thus laid down: "The liability of the defendants in the case before us is of the latter kind [*i. e.*, founded on contract], and falls within the principle of a series of decisions which leave no room for doubt. The case does not . . . fall within the principle contended for on the part of the

(*c*) "An action on the custom of the realm against a common carrier is for a tort or for a supposed crime, and the plea is 'not guilty;' therefore, at common law the action will not lie against the carrier's executors, but an action of assumpsit will lie against them on the very same cause." Williams, Executors, 6th ed., 1598, citing Cowp. 375. See further, Chapter XVIII., *post.*

(*d*) Powell v. Layton, 2 N. R. 367, 370, per Sir J. MANSFIELD, C. J.

(*e*) Alton v. Midland Rail. Co., 19 C. B., N. S. 213; 34 L. J. 292, C. P.

plaintiffs, for this simple reason—because the rights founded on contract belong to the person who stipulated for them. Here the right to be carried safely was stipulated for by the servant. It was a right acquired by him by reason of a bargain of the defendants. (*f*) . . . This is a case in which there would have been no duty but for the contract to carry safely in consideration of a certain payment. The passenger purchases the duty which the law says arises out of the contract, and has his election to sue upon the contract, or for the breach of the duty founded on the contract. (*g*) . . . . It has been strongly, but . . . . erroneously, urged, that the cause of action here is founded on a wrong. The law does not so deal with it; it gives the right to sue in form either in tort or contract, at the party's election." (*h*)

But though in numerous cases (*i*) actions for torts founded on contract have been considered as essentially actions on contract, they have also been treated as actions for tort.

"Ever since Pozzi v. Shipton, (*k*) the action
[19] against common carriers on the custom has been considered an action strictly of tort." (*l*)

"It seems to me" (it has been said in another case), "that the whole current of authorities, beginning with Govett v. Radnidge, (*m*) and ending with Pozzi v. Shipton, establish that an action of this sort" [*i. e.*, against carriers for negligence] "is in substance not an action on contract, but an action of tort against the company as carriers." (*n*) Hence, in the case from which the quotation is taken, (*o*) a servant was held entitled to sue for the

(*f*) Ibid., 19 C. B., N. S. 239, 240, per WILLES, J.

(*g*) Ibid., 241, Judgment of WILLES, J.

(*h*) Ibid., 240, per WILLES, J.

(*i*) See, in favor of this view, Marzetti v. Williams, 1 B. & Ad. 415; Winterbottom v. Wright, 10 M. & W. 109, 11 L. J. 47, Ex.; Tollit v. Shenstone, 5 M. & W. 283.

(*k*) 8 A. & E. 963.

(*l*) Tattan v. G. W. Rail. Co., 29 L. J. 186, Q. B., per CROMPTON, J.

(*m*) 3 East, 62.

(*n*) Marshall v. York, Newcastle and Berwick Rail. Co., 11 C. B. 663, per WILLIAMS, J.

(*o*) 11 C. B. 655; 21 L. J. 34, C. P.

loss of his luggage, though the contract for its carriage was with his master, and he, therefore, had the action been held to be on contract, could not have sued ; (*p*) and in a subsequent case, it is said by BLACKBURN, J., "I think that what is said in the case of Marshall v. York, Newcastle and Berwick Railway Company was quite correct, and that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." (*q*)

The difference of opinion which exists amongst equally high authorities is less than it might at first sight appear. Actions against common carriers have been thought an admitted exception to ordinary rules, and the matter in dispute will generally be found to be, not what is the true nature of torts founded on contract, but whether in a given case, *e. g.*, an action against a railway company for negligence, the ground of the action was in any sense the contract.

In spite of conflicting decisions, the doctrine laid [20] down by Sir J. MANSFIELD, C. J., is (it is submitted) in theory correct. Actions for torts founded on contract, though in form actions for tort, are in reality actions for breach of contract. They owe their existence to the fact, that for technical reasons (some of which still exist (*r*)) declarations were often framed in tort where the real cause of action was the breach of a contract. (*s*)

A plaintiff has often a choice of suing either on contract or for tort.

Sometimes the act of the defendant may amount at once to a breach of contract and to a tort.

More frequently the plaintiff's choice arises from the fact that a party aggrieved may treat what is really a wrong as a breach of an implied contract, or what is in

(*p*) Rule 10. Compare, as agreeing with this view, Martin v. Great Indian Rail. Co., L. R. 3 Ex. 9 ; 37 L. J. 27, Ex.

(*q*) Austin v. G. W. Rail. Co., L. R., 2 Q. B. 447 ; 36 L. J. 202, Q. B.

(*r*) See *ante*.

(*s*) Bullen, Pleadings, 3rd ed., 273.

reality a breach of contract as a wrong founded on contract.

A person, for example, whose goods have been wrongfully sold may either sue for the tort, in an action of trover, (*t*) or, if he pleases, claim the amount received for the sale as a debt for money received for his use; and a person whose goods have not been delivered by a carrier may sue the carrier either for a breach of the agreement to deliver, *i. e.*, on contract, or for neglect of the duty to carry the goods safely, *i. e.*, for tort.

When the act complained of is one which enables the plaintiff to sue either for breach of contract or for tort, he can treat the same act in one count of the declaration as a breach of contract and in another count as a tort.

The mode in which an action is brought can not affect the substantial legal rights of the parties, (*u*) but may nevertheless have important effects.

First. A plaintiff who treats a tort as if it were a breach of contract exposes himself to the disadvan-
[21] tages of suing on contract, *e. g.*, he is liable to a plea of set-off, (*w*) and can not obtain costs (*x*) unless he recovers more than £20.

Secondly. A plaintiff who treats a breach of contract as if it were a wrong, though he may gain some advantages of procedure, *e. g.*, exclude a plea of set-off, and perhaps gain costs on a verdict for any sum above £10, (*y*) can not (it would seem) change the substantial rights of the parties, *e. g.*, he can not make an infant or married woman liable on a contract by treating the breach of contract as a tort. (*z*)

While, in short, a plaintiff can, by varying the mode in which an action is brought, affect points of proce-

(*t*) Lythgoe v. Vernon, 5 H. & N. 180; 29 L. J. 164, Ex.

(*u*) Alton v. Midland Rail. Co., 19 C. B., N. S., 241; 34 L. J. 292, C. P.

(*w*) See Leake, Contracts, 48.

(*x*) Tattan v. G. W. Rail. Co., 29 L. J. 184, Q. B.

(*y*) It may be questioned whether this is so under the late Act (30 & 31 Vict. c. 142).

(*z*) Wright v. Leonard, 30 L. J. 365, C. P.; 1 C. B., N. S., 258. See as to infants, Chapter XXIX.; as to married women, Chapter XXX.

dure, he can not affect the substantial rights of the parties. (*a*)

The law as to the plaintiff's election is thus stated by WILLES, J. (*b*):—

"Election, it must be admitted, is purely technical, and was intended to give the party a more convenient and compendious remedy. If traced to its origin, there would be found many instances to prove that. I may mention a few of them. First, I will start with the doctrine of implied promises, because whether the law raises a duty or implies a promise which the parties did not stipulate for, is all one. Take the case of a contract with various stipulations, as in a building contract; and take it that the contract is only partly completed, without any default on the part of the builder. Certain of the work has been done and certain materials supplied: the law gives the builder his election to declare upon the special contract, or he may say that he has done [22] the work and supplied the materials, and that the defendant promised to pay him the value on request. That was the state of the law when the case of Bretherton v. Wood (6 J. B. Moore, 141; 9 Price, 408; 3 Brod. & B. 54), and the other cases relied on, were decided. But no one would contend that the change in the mode of declaring would affect the legal rights of the parties. That is one instance where an election is given in the mode of procedure. I might travel through an infinite series of legal fictions. Take the case of a man selling the goods of another without his authority. The law allows the party whose goods are so sold to declare in an action for the wrongful conversion, or at his election, to sue on the implied promise to pay over the proceeds to him, though in truth there was no such promise. These are cases in which the law has invented fictions to give a more con-

(*a*) As to this point, compare Alton v. Midland Rail. Co., 19 C. B., N. S., 213, 34 L. J. 292, C. P.; Marshall v. York, Newcastle, and Berwick Rail. Co., 11 C. B. 655; 21 L. J. 34, C. P.; and Martin v. Great Indian Rail. Co., L. R. 3 Ex. 9, 37 L. J. 27, Ex.

(*b*) Alton v. Midland Rail. Co., 19 C. B., N. S., 240, 241.

venient remedy to the party wronged. In the last case you have an instance of an election which is clogged in this way; if the plaintiff chooses to bring an action for money had and received, he subjects himself to all the consequences of the defendants being let in to plead a set-off, infancy, and the like."

Actions were originally divided into certain "kinds," or, as they are called, "forms" (*c*) of action. Thus an action for a breach of covenant belongs to one form (*sc.* covenant), for the breach of a contract not under seal to another (*sc.* assumpsit), for an assault to a third (*sc.* trespass), and so forth.

The distinction between forms of action used to be essential, since the form of each action was mentioned in the writ, and it was necessary that all the causes of action for which a plaintiff sued in one and the same action should belong to the same form, *e. g.*, a declaration might contain any number of counts for different breaches of covenant, but could not contain one count for the breach of a covenant (*i. e.*, a contract under seal), and
[23] another count for the breach of any contract not a covenant.

Now that no form or cause of action is mentioned in the writ, (*d*) and different causes of action may be combined in the same declaration, (*e*) forms of action may be considered practically abolished. But it is still essential, with a view to understand the rules as to parties, to bear in mind the distinction between different forms.

These forms may be considered (*f*) as subdivisions or species of the two classes of actions on contract and actions for tort respectively.

(*c*) See *ante*.

(*d*) C. L. P. Act, 1852, s. 3.

(*e*) Ibid., s. 41.

(*f*) They may be so considered for convenience; but the division of actions into forms existing earlier than, and independently of the division into actions ex contractu and actions ex delicto. Case originally included assumpsit, trover was considered a species of case, and detinue was held for some purposes an action ex contractu. 3 Steph. Com., 6th ed., 385 n. (*c*). Danby v. Lamb, 11 C B., N. S., 427.

The forms of actions are :—

1. Debt 2. Covenant 3. Assumpsit	on contract.
4. Trespass 5. Trespass on the case 6. Trover 7. Detinue 8. Replevin	for tort.

Of the above eight forms three belong to actions ex contractu, five to actions ex delicto.

"Debt" lies where a person claims the recovery of a debt, *i. e.*, a liquidated or certain sum of money alleged to be due to him, and is generally founded on some contract alleged to have taken place between the parties, or on some matter of fact from which the law will imply a contract between them. (*g*)

"Covenant" lies where a party claims damages [24] for a breach of covenant, *i. e.*, of a promise under seal. (*h*)

"Assumpsit" lies where a party claims damages for a breach of a simple contract, *i. e.*, a promise not under seal.

"Trespass" lies where a party claims damages for a trespass committed upon him, *i. e.*, for an injury of a direct and immediate kind committed on the person, or tangible and corporeal property of the plaintiff.

"Case" (or "Trespass on the case") lies where a party claims damages for any wrong not included under the head of trespass.

Case includes under it the greater number of torts, *e. g.*, torts arising from negligence, fraud, &c.

(*g*) Stephen, Pleading, 6th ed., 16. Assumpsit could never be maintained where covenant could, and vice versa; but debt could sometimes be brought where covenant could also be brought. Assumpsit will lie, though debt lies also. Com. Dig., Action upon the Case upon assumpsit, C.

(*h*) See previous note.

As distinguished from trespass it lies for an indirect, as contrasted with a direct and immediate injury. (*i*) But the distinction between the one form and the other is in many cases very fine, and there are instances wherein both or either trespass or case will lie. (*j*)

"Trover" lies where the plaintiff sues for damages for an interference with his right to possession of specific goods and chattels. Such interference is technically called "conversion."

"Detinue" lies where the plaintiff claims to recover specific goods or chattels wrongfully detained by the defendant.

This action differs in practice little from trover. (*k*)

The chief differences are, that a plaintiff can in an action for detinue obtain the return of the goods,
[25] (*l*) and that the gist of detinue is the wrongful detainer of the goods, (*m*) and of trover the wrongful dealing with them.

"Replevin" lies where goods have been wrongfully distrained, and occasionally where they have been wrongfully taken, though not as a distress. (*n*)

(B) *Local and Transitory Actions.*

Actions are further divided into "local" actions and "transitory" actions.

A local action is one which necessarily depends on local matters, such as the breaking into a house, the

(*i*) Scott v. Shepherd, 1 Smith L. C., 6th ed., 419

(*j*) Ibid., 423, and general notes to this case. Case has been defined as an action for any wrong or cause of complaint to which covenant or trespass do not apply. Stephen, Pleading, 6th ed., 617. This definition must apply to case in its original sense, in which it included assumpsit.

(*k*) Mockford v. Taylor, 19 C. B., N. S., 209; 34 L. J. 352, C. P

(*l*) C. L. P. Act, 1854, s. 78; and Day, Procedure Acts, 3rd ed., 273.

(*m*) Selwyn, N. P., 13th ed.; 583.

(*n*) Mellor v. Leather, 1 E. & B. 619, 22 L. J. 76, M. C.; Mennie v. Blake, 25 L. J. 399, Q. B. The action of ejectment is treated of separately. The action of account is so rarely brought as to be practically obsolete. See Selwyn N. P., Account, 13th ed., 1. It is not the aim of this treatise to treat of the action of writ of right of dower, dower, and quare impedit.

diversion of a stream, and generally injuries to real property which must happen in a particular place.

A transitory action is one which depends on transitory matters, such as the making and breach of a contract, or an assault to the person, which might happen as well in one place as in another. (*o*)

As a general rule, actions for wrongs in respect of land are local; and other actions, *e. g.*, for breach of contract or for wrongs not connected with real property, are transitory.

A local action must be tried in the county in which the cause of action arose.

A transitory action may be tried in any county [26] whatever at the option of the plaintiff.

Hence a local action can not be tried in our courts where the matters complained of took place beyond their jurisdiction, *i. e.*, beyond the limits of England, Wales, and Berwick-upon-Tweed. (*p*)

A transitory action can be tried in our courts whether the cause of action arose within or without the jurisdiction. (*q*)

(*o*) Mostyn v. Fabrigas, notes, 1 Smith L. C., 6th ed., 649; Bullen, Pleadings, 3rd ed., 2.

More accurately, perhaps, a local action is one which arises from some infringement of a right which must, if committed at all, be comitted at a particular place. A transitory action is one which arises from some infringement of a right which may, from its nature, be committed at any place whatever. See, as to the effect of this distinction, Chapter III.

(*p*) See further, *post.*

(*q*) Actions for damages and actions for debt. Another way of regarding actions is as actions for damages and actions for debt.

Under the head of actions for damages come all actions for tort, and all those actions on contract in which anything is claimed beyond a fixed and definite sum of money.

It is plain, that in an action for wrong, what is sought to be recovered is an indefinite sum, viz., such damages as the jury think fair compensation to the party aggrieved, *e.g.*, assaulted or slandered. It is equally plain that in some actions for breach of contract, what is sought to be recovered is a definite sum or debt, as, for example, where A. lends B. £20, and demands, simply and solely, its repayment; whilst, in others, what is sought for is an indefinite sum or damages, *e.g.*, where an action is brought for the non-delivery of goods, where the plaintiff of course seeks compensation for the damage which he has suffered by the non-delivery of the goods.

It is sometimes, however, not easy to decide at first sight whether an action

is brought to recover a liquidated demand, *i. e.*, a debt, or an unliquidated demand, *i. e.*, damages. Thus, an action for a sum due on a bill of exchange is one for a liquidated demand or debt ; but if there be added to this demand a further claim for the expense of noting, the action becomes an action for an unliquidated demand or damages (Rogers v. Hunt, 24 L. J. 23, Ex. ; 10 Ex. 474).

The following, for example, are all claims for debts or liquidated damages, viz :—

Claims under the common indebitatus counts, *e. g.*, for money paid or money lent.

Claims for a sum certain due on a bond or covenant.

Claims for liquidated damages under a covenant or agreement.

The following, on the other hand, are claims for unliquidated damages viz. :—

A claim for noting a bill of exchange (Rogers v. Hunt, 24 L. J. 23, Ex. ; 10 Ex. 474].

Claims under a guarantee (Williams v. Flight, 2 Dowl., N. S., 11 ; Atwool v. Atwool, 2 E. & B. 23 ; 22 L. J. 287, Q. B. But compare Brown v. Tibbets, 31 L. J. 206, C. P. : 11 C. B., N. S. 855).

[27] A claim for not accepting a bill of exchange (Hutchinson v. Reed, 2 Camp. 229).

A claim for damage from delaying a ship (Seeger v. Duthie, 8 C. B., N., S., 72 ; 30 L. J. 65, C. P.).

Claims upon a non-adjusted policy (Beckwith v. Bullen, 8 E. & B. 683; 27 L. J. 163, Q. B.).

A claim for the value of goods lost (Meyer v. Dresser, 33 L. J. 289, C. P., 16 C. B., N. S., 646).

The test by which to ascertain the nature of any claim is to consider what is the point to be decided by the jury. If all they have to decide is, first, was there a contract between the plaintiff and the defendant ? secondly, what was the contract between the plaintiff and the defendant ? and, thirdly, has it been broken ? then the action is brought for a liquidated demand or debt. Thus, where the plaintiff claims the price of goods sold, the sole questions for the jury are—first, did the defendant buy the goods ? secondly, at what price were the goods sold, *i.e.*, what was the contract ? and, thirdly, have they been paid for or not, *i.e.*, has the contract been broken ? The action is, therefore, for a liquidated demand or debt.

If the jury would have to decide, in addition to the three points already mentioned, the following fourth point, *i. e.*, what damage has the plaintiff suffered by the breach of contract ? then the action is one for an unliquidated demand or damages. Thus, where the action is for the non-delivery of goods, the jury must consider—first, was there a contract ? secondly, what was the contract ? thirdly, were the goods delivered or not, *i. e.*, was the contract broken ? and fourthly, what damage did the plaintiff suffer by the breach ? (Rogers v. Hunt, 24 L. J. 33, Ex., and 10 Ex., 474 ; Hodsall v. Baxter, 28 L. J. 61, Q. B. ; Hall v. Scotson, 23 L. J. 85, Ex., 9 Exch. 238). The action is, therefore, for an unliquidated demand or damages.

Several results of practical importance depend upon the distinction between actions for debt and actions for damages. The only result which need be noticed here is its effects upon the right of " set-off."

If X. is indebted to A. in £10, and A. is indebted to X. in £10, or more, and A. sues X. for the £10 which he owes him, X. can set off the debt which A. owes him against the debt which he owes A. ; and can, by so doing, ac-

cording to the amount of the respective debts, either defend himself from an action at the suit of A., or else reduce the amount recovered by A.

But it is a rule of law, that only debts (*i. e.*, liquidated claims) can be set-off against debts.

Neither can one claim for unliquidated damages be set-off against another, nor can a debt be set-off against a claim for unliquidated damages.

CHAPTER III.

GENERAL RULES APPLICABLE TO ALL ACTIONS.

RULE 2.—No action can be brought except for the infringement of a right.

As the ground of an action is always an interference with some right of the person aggrieved, every plaintiff must, in order to support his case, prove that his rights have been interfered with, by showing that the defendant has by his acts or omissions either broken a contract made with the plaintiff, *i. e.*, violated a right which the plaintiff had acquired by agreement with the defendant, or interfered with some right of the plaintiff, existing independently of any contract.

No man can support an action simply on the ground that he suffers damage from another's conduct. It constantly happens that acts which are popularly called injurious, because they occasion damage to a particular person, do not enable that person to sue, because they do not amount to an interference with his rights, and do not, therefore, constitute what in the legal sense of the term is an "injury." (*a*) On the other hand, when a man can sue because he suffers a damage, the cause of action is not, strictly speaking, the damage, but the interference with his right. This is expressed in technical language
[29] by the maxim, that "damage without injury is never a cause of action."

(*a*) The word "injury" has at least three senses. It means in common parlance any damage done by one person to another. It means in legal language either any interference with, or infringement upon, a right of any description whatever, or, secondly, an interference with a particular class of rights which exist independently of a contract. In its last sense the word is synonymous with a wrong or a tort.

The rule itself is perfectly clear, and needs to be borne in mind, not only in determining whether a given person has any right of action, but also, frequently, in ascertaining by which of two persons a wrong-doer ought to be sued; since it often happens that a wrongful act, which causes substantial damage to A., infringes upon the rights, not of A., but of B., who perhaps may be little damaged. Under such circumstances an action in the name of A. will fail, whilst an action in the name of B. will succeed. (*b*)

It is often difficult to decide whether a person who has been damaged has or has not suffered an injury. The nature and application of the rule are best seen from examples.

Many kinds of damage are clearly not injurious.

"If a school be set up in the same town where an ancient school has been time out of mind, by which the old school receives damage, yet no action lies. So, if I retain a master in my house to instruct my children, though it may be to the damage of the common master, yet no action lies.

"If I throw out windows in my house, which overlook my neighbor's house, and break in upon that privacy which he before enjoyed, no action lies." (*c*) So, no one can sue for mere damage to the prospect of view from his dwelling, (*d*) or for an interference with the current of air to his mill. (*e*) Nor has any one an absolute right to support from a house adjoining his own; (*f*) though the question what right, if any, the owner of a house has to support from the adjoining houses is not [30] completely settled.

It is, again, a damage for any one to be made defendant in an action without reason. Yet, if X., mistaking A. for

(*b*) See, *e. g.*, Hill v. Tupper, 2 H. & C. 121, 32 L. J. 217, Ex., noticed *post*. See Chapter XIX. for cases where an action of trespass should be brought in the name of a tenant, though really on behalf of a landlord.

(*c*) Bacon, Abr., Actions, B.

(*d*) Aldred's case, 9 Coke, 58 b.

(*e*) Webb v. Bird, 10 C. B., N. S., 268; 30 L. J. 284, C. P.; 10 C. B., N. S. 841; 31 L. J. 245, C. P., Ex. Ch.

(*f*) Solomon v. Vintners' Co., 4 H. & N. 585; 28 L. J. 370, Ex.

B., serves a writ upon him, and follows up the action against him, A., though he has a good defense, and can recover costs, has no remedy against X. for the inconvenience to which he has been put, provided the proceedings have been adopted purely through mistake; for though damage may have resulted to him, it is damnum absque injuria, and no action lies. Indeed, every defendant against whom an action is unnecessarily brought, experiences some damage or inconvenience beyond what costs compensate him for, and yet has no remedy. (*g*)

It can not, however, be absolutely laid down that a person may never sue another for having brought an action against him. "That an action may be brought under such circumstances as to render it morally wrong and injurious in fact is certain, though the authorities leave it in doubt whether under any circumstances the person so sued can recover damages for the vexation and annoyance caused to him by the false suit," (*h*) *i. e.*, whether he can treat it as an injury.

Defamatory statements are in general actionable when they cause damage, and are frequently so when they do not cause any damage. Yet, even when most damaging, they are under many circumstances not to be esteemed injuries.

Thus, no true assertion, however damaging or defamatory in its character, can, whether made in writing or by word of mouth, give a cause of action (*i*) to the per-
[31] son damaged; since the publisher of the libel, or the utterer of the slander, can always defend himself in an action at law by proving the truth of the assertion complained of.

Nor are defamatory statements, even when untrue, always actionable, though causing damage to the person of whom they are written or spoken. For such state-

(*g*) See Davies v. Jenkins, 11 M. & W. 756, judgment of ROLFE, B.

(*h*) Wren v. Weild, L. R. 4, Q. B. 730, 735, judgment of BLACKBURN, J. The authorities are reviewed in this judgment.

(*i*) It may, however, under some circumstances be the subject of an indictment.

ments are often privileged, *i. e.*, made under circumstances such as to exempt the person making them from liability to be sued. They may be privileged on various grounds, as for instance, that they are made bonâ fide in the assertion of a right, or the performance of a duty ; (*k*) that they are fair criticisms on matters of public interest ; (*l*) that they are words pertinent to the matter in issue, spoken by an attorney or advocate in the course of a judicial proceeding, (*m*) or by a witness in giving his evidence, or are a fair report of proceedings in a trial, or of a debate in parliament. (*o*) The point to be here noticed is, that privileged statements, whenever they cause damage, afford an example of damage without injury. (*p*)[1]

(*k*) Whiteley v. Adams, 15 C. B., N. S., 392 ; 33 L. J. 89, C. P. ; Cowles v. Potts, 34 L. J. 247, Q. B.

(*l*) Campbell v. Spottiswoode, 32 L. J. 185, Q. B. ; 3 B. & S. 769.

(*m*) Mackay v. Ford, 5 H. & N. 792 ; 29 L. J. 404, Ex. ; Revis v. Smith, 18 C. B. 129 ; 25 L. J. 195, C. B. ; Henderson v. Broomhead, 4 H. & N. 569 ; 28 L. J. 360, Ex.

(*o*) Wason v. Walter, L. R. 4, Q. B. 73 ; 38 L. J. 34, Q. B.

(*p*) See notes to Ashby v. White, 1 Smith, L. C., 6th ed., 258, 259 ; Dawkins v. Lord Paget, L. R. 5, Q. B. 94.

[1] As to the rules regulating what are known in law as "privileged communications," see Morgan's Law of Literature, i. 205, 215–221 ; ii. 433. As illustrating the rule as established in the United States concerning privileged communications, the case of Philadelphia, Wilmington & Baltimore R. R. Co., reported in 21 How. 202, 6 Am. Railway Rep. 506, the question as to how far the report of the directors of a corporation to its stockholders was a privileged communication, in respect to an alleged injurious libel contained therein, arose. Said Mr. Justice CAMPBELL in that case : "The plaintiff, Quigley, a citizen of Delaware, complained of the defendants 'a body corporate in the state of Maryland, by a law of the general assembly of Maryland, for the publication of a libel by them, in which his capacity and skill as a mechanic and builder of depots, bridges, station-houses, and other structures for railroad companies had been falsely and maliciously disparaged and undervalued. The defendants pleaded the general issue. On the trial of the cause, it appeared that, in 1854, the president and directors, then in charge of the affairs of the defendants, instituted an inquiry into the administration and

In the foregoing instances the person damaged has clearly not been injured, *i. e.*, has not suffered an interference with his rights. The following examples illus-

management of a person who had been the superintendent of their railroad for ten years. Among other subjects, the nature of his connection and dealings with the plaintiff, who had likewise been in the service of the corporation as "general foreman of all their carpenters," engaged the attention of the committee of investigation. The president of the company, who conducted the inquiry before this committee on behalf of the corporation, seems to have been convinced that the superintendent had exhibited partiality for the plaintiff, and had allowed him extravagant compensation for service, and the privilege of free transit over the road for himself, his workmen, and freight, to the detriment of the company, and in breach of his duty as superintendent. The superintendent defended himself against these and other imputations, and produced testimony to the skill and fidelity of the plaintiff while in the service of the company; also, to the value of his services, and to the effect that no unusual or improper favor had been extended to him. The president of the company, in the course of the investigation, addressed a letter to an architect, who had some acquaintance with the plaintiff, to request his opinion of his skill as a mechanic, and whether the services of the plaintiff could have had any peculiar value to a railroad company. The reply of this architect was very pointed and depreciative of the plaintiff, affirming that "he was not entitled to rank as a third-rate workman," and "was unable to make the simplest geometrical calculations." All the testimony collected by the committee, as produced by the superintendent, was carefully reduced to writing, and printed; first, for the use of the president and directors, and afterwards was submitted to the company, at their meeting, on the 8th of January, 1855, with a report, which exonerated in a great measure the superintendent from any malpractice in consequence of his relations with the plaintiff. The investigation was searching, and testimony, which, with the report of the committee, fills two printed volumes, was submitted to the company. The letter of the architect, in answer to the letter of the president, is printed in one of these volumes, and this publication is the libel complained of. Several of the directors testify that they were not aware of the publication, and evidence was adduced that the plaintiff had declared that the

trate the difficulty which may arise in determining whether a person damaged has or has not been injured. A., the plaintiff, was the lessee of mines, the defendants

investigation had resulted in increasing his business. A verdict was returned in favor of the plaintiff. The defendants are a company incorporated by the legislatures of Delaware and Pennsylvania, as well as of Maryland, to construct a railroad to connect the three cities which contribute to form its name, and a portion of their directors and stockholders are citizens of Delaware. The defendants contend that they are not liable to be sued in this action; that theirs is a railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and therefore that no crime or offense can be imputed to it. That although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by the direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents, and we should be forced, as a legitimate consequence, to conclude that no action ex delicto or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the states of the Union relative to these artificial persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy, and capital of society, for the development of enterprises of public utility. There is scarcely an object of general interest for which some association has not been formed, and there are institutions whose members are found in every part of the Union, who contribute their efforts to the common object. To enable impersonal beings—mere legal entities, which exist only in contemplation of law—to perform corporal acts, or deal with personal agents, the principle of representation has

X. and Y. were the owners of a mill standing on land adjoining that under which the mines were worked.

[32] Defendants employed competent persons to con-

been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives. With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body, and their agents, with the natural persons with whom they are brought into contact or collision. The result of the cases is, that for acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found in the judicial annals of both countries of suits for torts arising from the acts of their agents, of nearly every variety. Trespass quare clausum fregit was supported in 9 Serg. and R. 94; 4 Mann. and G. 452; Assault and Battery, 4 Gray (Mass.) 465; 6 Ex. Ch. 314. For damages by a collision of rail-cars and steamboats, 14 How. 465; 19 How. 543. For a false representation, 34 L. and Eq. R. 14; 11 Wheat. 59. The case of the National Exchange Co. of Glasgow v. Drew (2 Macqueen, H. of L. Cas. 103), was that of a company in failing circumstances, whose managers sought to appreciate its stock by a fraudulent representation to the company, and a publication of the report as adopted by it, that its affairs were prosperous. Two of its stockholders were induced to borrow money from the company to invest in its stock. The question in the cause was, whether the company was responsible for the fraud. In the House of Lords, upon appeal, Lord St. Leonards said: "I have come to the conclusion, that

struct a reservoir. A. had worked his mines to a spot where there were certain passages of disused mines, which communicated with shafts which led to the land

if representations are made by a company fraudulently, for the purpose of enhancing the value of stock, and they induce a third person to purchase stock, those representations so made by them bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company." . . . The report "becomes the act of the company by its adoption and sending it forth as a true representation of their affairs; and if that representation is made use of in dealing with third persons for the benefit of the company, it subjects them to the loss which may accrue to the party who deals, trusting to those representations." It would be difficult to furnish a reason for the liability of a corporation for a fraud, under such circumstances, that would not apply to sustain an action for the publication of a libel. The defendants are a corporation, having a large capital distributed among several hundreds of persons. Their railroad connects large cities, and passes through a fertile district. Their business brings them in competition with companies and individuals concerned in the business of transportation. They have a numerous body of officers, agents, and servants, for whose fidelity and skill they are responsible, and on whose care the success of their business depends. The stock of the company is a vendible security, and the community expects statements of its condition and management. There is no doubt that it was the duty of the president and directors to investigate the conduct of their officers and agents, and to report the result of that investigation to the stockholders, and that a publication of the evidence and report is within the scope of the powers of the corporation. But the publication must be made under all the conditions and responsibilities that attach to individuals under such circumstances. The Court of Queen's Bench, in Whitefield v. South East. R. R. Co. (May, 1858), say: "If we yield to the authorities which say that, in an action for defamation, malice must be alleged, notwithstanding authorities to the contrary, this allegation may be proved by showing that the publication of the libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill-will to the plaintiffs, and did not mean to injure them." And the court concluded: "That for what is done by the

above, and which were apparently filled up with earth. No care was taken by the contractor or the engineer to fill up these shafts. The water introduced into X. and

authority of a corporation aggregate, that a corporation ought as such to be liable, as well as the individuals who compose it." The question arises, whether the publication is excused by the relations of the president and directors, as a committee from their board, to the corporation itself. It can not be denied that the inquiries directed by those officers were within the scope of their power, and in the performance of a moral and legal duty, and that the communication to their constituents of the evidence collected by them, and their conclusions upon the evidence, was a privileged communication in the absence of any malice or bad faith. But the privilege of the officers of the corporation as individuals, or of the corporate body, does not extend to the preservation of the report and evidence in the permament form of a book for distribution among the persons belonging to the corporation or the members of the community. It has never been decided that the proceedings of a public meeting, though it may have been convened by the authority of law, or of an association engaged in an enterprise of public utility, could be reported in a newspaper as a privileged publication. But a libel contained in such proceedings, if preserved in the form of a bound volume, might be attended with more mischief to private character than any publication in a newspaper of the same document. The opinion of the court is, that in so far as the corporate body authorized the publication in the form employed, they are responsible in damages. The circuit court instructed the jury: 1. If the jury find, from the evidence in this case, that the defendants, by the president and directors of said company, published the letter from John T. Mahoney to S. M. Felton, president, &c., dated March 3, 1854, in the declaration mentioned, and that any or all of the statements in the said letter respecting the plaintiff in his trade and occupation are false; and shall further find, that the said president and directors, at the annual meeting of the stockholders of said company, held 8th January, 1855, reported to the said stockholders their action in the premises, and that the proceedings of the committee of investigation (which contained the said letter) were then being printed, and, as soon as printed, would be distributed to the stockholders, and that said report was accepted by the stockholders; and if the jury

Y.'s reservoir broke through the shafts and flooded A.'s mine.

There could in this case be no doubt that A. had been

shall further find that, after the meeting of the stockholders had adjourned, the president and directors of said company distributed the book containing the said letter among the stockholders of the company, or any of them, then the jury may find for the plaintiff. 2. And if the jury find for the plaintiff under the first instruction, they are not restricted in giving damages to the actual positive injury sustained by the plaintiff, but may give such exemplary damages, if any, as in their opinion are called for and justified, in view of all the circumstances in this case, to render reparation to plaintiff, and act as an adequate punishment to the defendant. The first instruction is erroneous, because the publication to which the court referred as blameworthy, and to authorize the jury to find a verdict against the defendant, took place after the commencement of this suit. The second instruction contains the same error, and is objectionable for the additional reason that the rule of damages is not accurately stated to the jury. In Day v. Woodworth, 13 How S. C. R. 371, this court recognized the power of a jury in certain actions of tort to assess against the tort-feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations. Nothing of this kind can be imputed to these defendants. The letter of Mahoney was reported to the company with other evidence that rendered it innocuous, and its statements were never adopted by them. The plaintiff has repeatedly affirmed that he had derived an advantage from the investigation by the company, and, upon reading all the evidence, as reported and published, we do not perceive how an impression unfavorable to him could have been made by it upon any candid mind. The circumstances under which the evidence was collected, and the publication made, repel the presumption of the existence of malice on the part of the corporation, and so the jury should have been instructed. The averments in the declaration of the facts

damaged. The question for consideration was, in substance, whether A. had suffered an injury from X. and Y., for though the form which the question took was what was the strict duty of X. and Y. towards A., this inquiry is in substance exactly the same as the question what was the right of A. against them. The question at issue is thus stated by the court:—

"The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law, therefore, arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands, that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors. But the question arises whether the duty which the law casts upon him under such circumstances is an

proper to give the circuit court jurisdiction over the parties, are identical with those which were fully considered by this court, and received the sanction of two-thirds of the judges, in Marshall v. Baltimore and Ohio R. R. Co., 16 How. 314. A repetition of the discussion that took place and was reported with that case is deemed to be unnecessary. The only plea filed in this cause is the general issue. That plea raises an issue upon the merits of the complaint, and leaves the jurisdictional allegations without a traverse. No question involving the capacity of the parties in the cause to litigate in the circuit court can be raised before the jury under such pleadings. Conard v. Atlantic Insurance Co., 1 Pet. 386; Evans v. Gee, 11 Pet. 80; Owings v. Wickliffe, 17 How. 47. The testimony that the states of Delaware and Pennsylvania had respectively granted a corporate character to the same corporators that form the corporation in Maryland, for the extension of the railroad through those states, to connect the cities that appear in the name of the corporation, and the testimony that some of the directors of the several corporations reside in Delaware, in the condition of the pleadings, was immaterial and irrelevant.

absolute duty to keep it at his peril, or is . . . . merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect." (*q*) [33]

The question therefore was, what was A.'s right? If A. had an absolute right to insist upon the defendants keeping the water off his land, he had suffered an injury. If A. had only a right to insist upon the defendants taking reasonable care to keep the water off his land, he had suffered a loss, but had not suffered an injury. The majority of the court of exchequer held (*r*) that the plaintiff's right was only to insist on reasonable care on the part of the defendants, and that A. therefore could not maintain an action. The exchequer chamber (*s*) held that A.'s right was to have the water kept off his land, and that therefore A. could maintain an action, and the house of lords affirmed (*t*) the judgment of the exchequer chamber. A., therefore, must now be taken to have suffered an injury as well as a loss.

A.'s right would, however, have been different had the water accumulated naturally, and not been artificially collected. (*u*)

Wherever the rights of adjacent owners, or the rights of persons of whom one owns the surface of the soil, and the other the soil below the surface, come into question, the inquiry, what does or does not constitute an injury to

(*q*) Fletcher v. Rylands, L. R. 1, Ex. 279, Ex. Ch.
(*r*) Ibid., 34 L. J. 177, Ex.; 3 H. & C. 774.
(*s*) Ibid., L. R. 1, Ex. 265; 35 L. J., 154 Ex. (Ex. Ch.).
(*t*) Ibid., L. R. 3 H. L. 230.
(*u*) Smith v. Kenrick, 7 C. B. 515; 18 L. J. 172, C. P. Compare Baird v. Williamson, 33 L. J. 101, C. P.; 15 C. B., N. S., 376

the one party or the other, is apt to give rise to fine distinctions.

The owner of land, for example, has a right to support for his land from the adjacent land; (*v*) but this right is not an absolute right, and the infringement [34] of it is not a cause of action without appreciable damage. (*w*) But this right of the owner to support from the adjacent land extends only to the land in its natural unincumbered state, and not with the additional weight of the buildings upon it. (*x*) For "it may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action. But, if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." (*y*) The owner of the land has, again, a right to support for the natural surface, as against the owner of the subjacent strata, (*z*) though not to support of buildings erected thereon, (*a*) yet he may maintain an action for disturbance of the natural right to support for the surface, notwithstanding buildings have been erected thereon, provided the weight of the buildings did not cause the injury. (*b*)

Take, again, rights having reference to water. A mill-owner has no right of action against a person who, by digging a well on his own land, prevents the natural percolation of water to his mill-stream. (*c*) But a person has a right of action when an underground stream which

(*v*) Nicklin v. Williamson, 10 Ex. 359; 23 L. J. 335, Ex.; Smith v. Thackerah, L. R. 1, C. P. 564; 35 L. J. 276, C. P.

(*w*) Nicklin v. Williamson, 10 Ex. 359; 23 L. J. 335, Ex.; Smith v. Thackerah, L. R. 1, C. P. 564; 35 L. J. 276, C. P.

(*x*) Dodd v. Holme, 1 A. & E. 493; Wyatt v. Harrison, 3 B. and Ad. 871.

(*y*) Wyatt v. Harrison, 3 B. & Ad. 876, per CURIAM.

(*z*) Humphries v. Brogden, 12 Q. B. 739; 20 L. J. 10, Q. B.; Smart v. Morton, 5 E. & B. 30; 24 L. J. 260, Q. B.

(*a*) See Humphries v. Brogden, 12 Q. B. 742; 20 L. J. 10, Q. B.

(*b*) Stroyan v. Knowles, 6 H & N. 454; 30 L. J. 102, Ex.

(*c*) Chasemore v. Richards, 29 L. J., (H. L.) 81, Ex.; 7 H. L. C. 349.

flows into the plaintiff's mill-stream is fouled by the works of the defendant. (*d*) And the general rule on this point seems to be that a proprietor of land has a right to have the natural streams of water which run through [35] his land, run in their natural course, (*e*) and has a right also to use it as it passes, (*f*) and all riparian proprietors have these rights; (*g*) but that on the other hand, with respect to water, whether on the surface or under ground, not running in defined streams, no similar rights exist. Such water is the absolute property of the owner of the soil of which it forms a part, and no action will lie for abstracting it, although such abstraction may diminish the water under neighboring lands, or otherwise injure them. (*h*) Hence, where A. was the owner of land, and X., by draining his own land, withdrew from A. water which theretofore ran beneath A.'s land, and thereby caused A.'s land to subside, A. was held to have no right of action against X. (*i*)

A. and B. (the plaintiffs) were allowed by M., the proprietor of a canal, to divert some of the water in it, and use it for their steam-engines. X. (the defendant) fouled the water of the canal, whereby it flowed into their premises in a foul state, and injured the boilers of their engines. (*k*) The damage to A. and B. was in this case clear. The question was, whether the plaintiffs, being simply permitted by M. to use the stream, had a right of action against X. The Court of Exchequer (*l*) held that the plaintiffs had a right of action, *i. e.*, had sustained an injury. The judges in the Exchequer Chamber (*m*) were

(*d*) Hodgkinson v. Ennor, 4 B. & S. 229; 32 L. J. 231, Q. B.; and see Acton v. Blundell, 13 L. J. 289, Ex.

(*e*) Wood v. Wand, 3 Ex. 748, 775.

(*f*) Embrey v. Owen, 20 L. J. 212, Ex.; 6 Ex. 369.

(*g*) Ibid.

(*h*) Acton v. Blundell, 12 M. & W. 324; 13 L. J. 289, Ex.; Chasemore v. Richards, 29 L. J. 81, Ex.; 7 H. L. C. 349.

(*i*) Popplewell v. Hodkinson, L. R. 4, Ex. 248; 38 L. J. 126, Ex. (Ex. Ch.).

(*k*) Whaley v. Laing, 2 H. & N. 476; 26 L. J. 327, Ex.; 3 H. & N. 675; 27 L. J. 422, Ex. (Ex. Ch.).

(*l*) 2 H. & N. 476; 26 L. J. 327, Ex.

(*m*) 3 H. & N. 675; 27 L. J. 422, Ex. (Ex. Ch.).

equally divided in opinion as to whether the plaintiffs had or had not a right of action.

"It is contended," says CROWDER, J., "that no [36] right of action is shown in the declaration. . . . . But I think it sufficiently appears that the plaintiffs were in the lawful enjoyment of a beneficial flow of clear water from the branch canal, and that the defendant wrongfully polluted the stream, and thereby damaged the plaintiffs, which appears to me a sufficient statement of a good cause of action." (*n*)

The opposite view is thus stated by WILLIAMS, J.: The declaration "shows no cause of action; it merely alleges that the plaintiffs had enjoyed the benefit of the waters of a canal, near to their engine, which waters had been used, and ought to have been free from the pollution thereinafter mentioned; and it then avers that the defendant polluted them and thereby damaged the engines. I agree with the Barons of the Exchequer as to the construction of the allegation that the waters ought to have been free from pollution, viz., that it means, not an assertion of title in the plaintiffs, but that the defendant had no right to foul the water. But if this be so, then the declaration contains no allegation whatever that the plaintiffs were rightfully in the enjoyment of the benefits of the waters, and there is nothing to show that they were not themselves wrong-doers, in which case I think they would have no right of action." (*o*)

"I can find," it is said by WIGHTMAN, J., "nothing in the declaration to show that the defendant, by fouling the water, injured any right of the plaintiffs, nor that as against them he can be considered a wrong-doer, and the introduction of the word 'wrongfully,' will not make him, primâ facie, a wrong-doer, unless the circumstances stated in the declaration show him to be so. I am therefore of opinion that the declaration does not show any right of action against the defendant." (*p*)

(*n*) Whaley v. Laing, 3 H. & N. 680 (Ex. Ch.), per CROWDER, J.
(*o*) Ibid., 683, judgment of WILLIAMS, J.
(*p*) Ibid., 685, judgment of WIGHTMAN, J.

This case therefore raised the question, whether a person merely permitted to use certain water has a right as against a wrong-doer to have the water kept pure; [37] and though the rights of such a mere licensee still appear doubtful, it would seem that a person to whom the right to use the water has been regularly granted by the owners of the stream, may sue any one who pollutes it, (*q*) on the principle that "as a general rule, when a man has a property, he may grant to others estates in, and right of enjoyment of it, and the grantees may maintain actions against those who disturb them." (*r*)

A canal company granted by deed to A. (the plaintiff) the sole and exclusive right or liberty of putting or using pleasure-boats for hire on their canal. X. (the defendant) put and used pleasure-boats for hire on the canal. It was held (*s*) that A. could not bring an action in his own name against X. The ground of this decision is, that though X. was a wrong-doer as against the company, and that though A. had a right as against the company to the exclusive use of the canal, X. had not violated any right possessed by A. as against him.

"This grant merely operates as a license or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right. It is argued that as the owner of an estate may grant a right to cut turves, or to fish, or hunt, there is no reason why he may not grant such a right as that now claimed by the plaintiff. The answer is that the law will not allow it. So the law will not permit the owner of an estate to grant it alternately to his heirs male and heirs female. A new species of incorporeal hereditament can not be created at the will and pleasure of the owner of property; but he must be content to accept the estate and the right to dispose of it

(*q*) Nuttall v. Bracewell, L. R. 2, Ex. 1; 36 L. J. 1, Ex. See Stockport Water Works Co. v. Potter, 3 H. & C. 300; 31 L. J. 9, Ex.

(*r*) Ibid., L. R. 2, Ex, 11, per BRAMWELL, B.

(*s*) Hill v. Tupper, 2 H. & C. 121; 32 L. J. 217, Ex.

subject to the law as settled by decisions and con-
[38] trolled by Acts of Parliament. A grantor may bind himself by covenant to allow any right he pleases over his property, but he can not annex to it a new incident so as to enable the grantee to sue in his own name for an infringement of such a limited right as that now claimed." (*s*)

"This grant is perfectly valid as between the plaintiff and the canal company; but in order to support this action, the plaintiff must establish that such an estate or interest vested in him that the act of the defendant amounted to an eviction. None of the cases cited are at all analogous to this, and some authority must be produced before we can hold that such a right can be created. To admit the right would lead to an infinite variety of interests in land, and an indefinite increase of possible estates. The only consequence is that, as between the plaintiff and the canal company, he has a perfect right to enjoy the advantage of the covenant or contract; and, if he has been disturbed in the enjoyment of it, he must obtain the permission of the canal company to sue in their name." (*t*)

This case deserves particular notice. A. (the plaintiff) had no right of action, because X. had neither broken any contract with him, nor invaded any right which he possessed as against X. independently of contract. X. was a wrong-doer, but the wrong he committed was an invasion of the rights, not of A., but of the company, who had granted to A. the sole use of the canal. A., on the other hand, possessed rights with regard to the canal, but these rights arose out of the contract between him and the company, and were rights against the company only. A. therefore might probably have sued the company for a breach of their contract with him in allowing X. to use the canal, or might have obtained from the company permission to sue X. in their name.

[39] The case would have been different if X., in-

(*s*) Hill v. Tupper, 2 H. & C. 127, 128, judgment of POLLOCK, C. B.
(*t*) Ibid. 128. Judgment of MARTIN, B.

stead of merely rowing on the canal, had attempted to exclude A. from it. Under such circumstances a distinct right of A.'s, *sc.*, to go freely on the canal, would have been violated, and A. might have brought an action against X. in his own name.

"It was competent for the grantors in Hill v. Tupper to grant the plaintiff a right of rowing boats on the canal, and had any one interfered with that right, the grantee might have maintained an action against him. But the plaintiff in that case did not sue because his rowing was interfered with, but because the defendant used a boat on the water. Now, suppose the grantors had granted to the plaintiff a right to row boats, and to [B.] a right (as far as the word is sensible) that no one but the plaintiff should row boats on the canal; clearly [B.] could not have maintained any action. He would not have sued in respect of any estate or of any easement, or of any mode of enjoyment which was disturbed, nor did the plaintiff in that case. It makes no difference that the two rights, as far as possible, were in him, viz., a right to row and a right to exclude others. It was in respect of the latter he sued, and it mattered not he possessed the former." (*u*)

The cases which have been cited in illustration of the principle that no one can sue who has not sustained an injury, have been taken from actions for tort. The principle itself applies equally to actions on contract. As, however, a person's right under a contract depends upon its terms, the inquiry what, if any, is the right of the plaintiff, resolves itself, in actions ex contractu, into the question, "what are the terms of the contract?"—the reply to which is a matter depending either upon direct evidence, or upon what is called the "interpretation" of documents.

If, however, the terms of a contract are not in fact fixed upon by the parties, but are affixed by [40] the law to the relation in which they have agreed to stand towards one another, the so-called inquiry into the terms of the contract is obviously nothing more than

(*u*) Nuttall v. Bracewell, L. R. 2, Ex. 11, 12, per BRAMWELL, B.

an inquiry into the nature of the right, if any, possessed by the plaintiff.

Thus, where it is sought to determine how far a common carrier is liable for the safety of passengers, (*x*) or a person who lets out seats on a stand for the safety of the sight-seers by whom the seats are hired, (*y*) the point for determination is in reality whether the plaintiff has or has not suffered an interference with his legal rights, and in short gives rise to a question of the same kind as that which has to be decided when it is necessary to ascertain what is the right, if any, which a landowner has to support from his neighbor's adjacent ground. Actions, however, brought on account of the breach of some condition, superadded by law or custom to the terms of a contract, are, though in essence actions on contract, most frequently, in form, actions for tort.

Since, of acts which cause damage some are "injurious" and others are not, it is natural to seek for a criterion to determine whether damage has or has not been occasioned by what the law esteems an injury, and the rule which has been laid down is "to consider whether any rights existing in the party damnified have been infringed upon, for if so, the infringement thereof is an injury."(*z*) But this maxim is in reality only a repetition of the rule that mere damage without injury does not give a cause of action. Another maxim which aims at defining the limits of different rights (and to do this is in reality to point out what acts are injurious) is "so to use your own property as not to injure the rights of another." (*a*) It has been criticised on the ground that "a party may damage the property of another where the law permits, and he [41] may not where the law prohibits, so that the maxim can never be applied till the law is ascertained, and when it is, the maxim is superfluous." (*b*)

(*x*) Readhead v. Midland Ry., L. R. 4, Q. B. 379; 38 L. J. 169, Q. B Ex. Ch.

(*y*) Francis v. Cockrell, L. R. 5, Q. B. 184; 39 L. J. 113, Q. B.

(*z*) Ashby v. White, notes, 1 Smith, L. C., 6th ed., 263.

(*a*) Broom, Maxims, 4th ed., 357.

(*b*) Tozer v. Child, 26 L. J. 151, Q. B.; 7 E. & B. 377.

On the whole, it may be doubted whether any general principle by which to discriminate acts which merely cause damage from those which amount to injuries, *i. e.*, are an infringement of legal rights, can be obtained.

RULE 3.—No action can be brought except for the infringement of a common law right. (*c*)

A person may possess rights which can not be enforced by an action; for our courts of law only consider legal rights. "Our courts of equity have other rules by which they sometimes supersede or supplement legal rules." (*d*) The rights enforceable in courts of equity only are termed equitable rights, and are never the basis of an action at law, (*e*) though their existence (*f*) is to some extent recognized by the common law courts.[1]

Hence, a cestui que trust can not bring an action against his trustee for his act as trustee.[2] Thus, a trustee who has received trust money, is accountable for it to the cestui que trust in the Court of Chancery, (*g*) but in the courts of law he is treated, for most purposes, as the absolute owner, and no action can in general be maintained by the cestui que trust against him to recover trust-money, for "it is quite clear that so long as no other relation subsists between two parties, except that of trustee and cestui que trust, no action can be maintained by the latter against the former for any money in his [42]

(*c*) As contrasted with an equitable right. Rights at common law are also frequently contrasted with rights given by statute.

(*d*) Bauerman v. Radenius, 2 Smith, L. C., 6th ed., 367, per KENYON, C. J.

(*e*) Bartlett v. Wells, 1 B. & S. 336; 31 L. J. 57, Q. B.

(*f*) Maberly v. Robins, 5 Taunt. 625; Powles v. Innes, 11 M. & W. 10; D'Arnay v. Chesneau, 13 M. & W. 796.

(*g*) Pardoe v. Price, 16 M. & W. 451.

[1] See Comby v. McMichael, 19 Ala. 747; Gaston v. Plane, 14 Conn. 349; Pond v. Clark, 24 Conn. 370.

[2] See Denton v. Denton, 17 Md. 403.

hands. The trustee is in such a case the only person entitled at law to the money, and the remedy of the cestui que trust is exclusively in a court of equity. . . . So long as there is no liability except as trustee, the cestui que trust has no legal remedy." (*h*) A husband, therefore, can not recover the property of his wife in the hands of a trustee (*i*) and an executor or administrator is in the position of a trustee, and the legacies or distributive shares, payable out of the estate of the deceased, can not be recovered at law as debts. (*j*) And it should be borne in mind that persons are legally considered as trustees who would not be so called in ordinary language. Thus a person who assigns the interest in a debt or other contract to another is an assignor trustee for the assignee.

A trustee may, however, make himself liable to an action by an acknowledgment or an admission that he holds a specific sum for his cestui que trust, (*k*) since after such an admission the trustee is debarred from setting up his character of trustee, and becomes liable at law to the cestui que trust for the money as for money received to his use. Thus, though a husband can not recover the separate property of his wife in the hands of a trustee, he can recover it as money received to his use in an action against an agent of the wife to whom the trustee has paid it over, (*l*) and an executor may have an action brought against him by a legatee, to whom he has admitted that he has received the money and holds it to his use; [43] and generally, "when there is no trust to execute except that of paying over money to the cestui que trust, the trustee by his conduct, as for instance by admission that he has money to be paid over, or by settling accounts on that footing may, and often does, make himself lia-

(*h*) Pardoe v. Price, 458, 459, per CURIAM; Edwards v. Bates, 7 M. & G. 590.

(*i*) Bird v. Peagrum, 13 C. B. 639; 22 L. J. 166, C. P.

(*j*) Deeks v. Strutt, 5 T. R. 690; Jones v. Tanner, 7 B. & C. 542; Williams, Executors, 5th ed., 1746.

(*k*) Remon v. Hayward, 2 A. & E. 666; Roper v. Holland, 3 A. & E. 99.

(*l*) Bird v. Peagrum, 13 C. B. 639; 22 L. J. 166, C. P. Compare Sloper v. Cottrell, 6 E. & B. 479; 26 L. J., 7 Q. B.; Fleet v. Perrins, L. R. 3, Q. B., 536; L. R. 4, Q. B. 500, Ex. Ch.; Topham v. Morecroft, 8 E. & B. 972.

ble to an action at law at the suit of the cestui que trust, for money had and received, or for money due on account stated. Such was the case of Roper v. Holland, (*m*) and there are many others to the same effect. But so long as there is no liability except as trustee, the cestui que trust has no legal remedy." (*n*)

In these cases the trustee is sued at law, if at all, not as a trustee, but as a debtor. (*o*)

Subordinate Rule.

Where one person has a legal and another an equitable interest in the same property, any action in respect of such property must be brought by the person who has the legal interest.[1]

It often happens that one person is legally and another equitably interested in the same property, as where A.

(*m*) 3 A. & E. 99.
(*n*) Pardoe v. Price, 16 M. & W. 458, 459, per Rolfe, B.
(*o*) Broom, Parties, 2nd ed., 109; Bullen, Pleadings, 3rd ed., 46, 47.

[1] The right of action follows the interest; Townsend v. Townsend, 5 Har. 127; Stoddard v. Mix, 14 Conn. 12; but this interest is not always such as can be determined at a glance. Where M. sued for the use of A., and the court was of the opinion, from the facts of the case, that A. had no interest in the suit before the action was brought,—held, that M. was the real plaintiff, who had the control of the suit, and that he might dismiss the suit without the sanction of A. Moore v. Bres, 19 La. Ann. 532. So on an indenture of apprenticeship made by selectmen as overseers of the poor, although designating themselves as selectmen, an action may be brought by subsequent overseers of the poor, as in interest; Powers v. Ware, 2 Peck. 451. A widow suing as her husband's administrator may recover a debt due to herself as widow. Tilson v. Dunbar, 26 Pa. St. 475. So a plaintiff, carrying on business in her own name, can recover for goods, belonging to the business, lost by a carrier, although another party have an nterest in the business. Mayall v. Boston, &c., R. R. Co.,

has assigned his interest in a contract to B. (*p*) Actions with regard to such property must be brought by or rather in the name of A., and not of B. (*q*)

(*p*) Castelli v. Boddington, 1 E. & B. 66, ; 22 L. J. 5, Q. B. ; 1 E. & B. 879 ; 23 L. J. 31, Q. B. (Ex. Ch.).

(*q*) When a mortgagor is in possession, he may indeed bring actions of trespass for interference with his right to possession ; but he then sues, not in virtue of owning the land, but simply in virtue of being in possession, on which ground a tenant may always bring trespass. Conf. as to Ejectment, Chapter XXXIII.

19 N. H. 122. A. can not sue, either at law or equity, on a promise made by B. to C. to pay A. a sum of money, for which the obligor has received no consideration. Thornton v. Smith, 7 Mo. 86. Where there is a consideration existing sufficient to uphold a verbal promise, as between the promisor and promisee, and the promise is to pay to a third party, and the third party is a child of the promisee, the effect of the promise will be the same as though it had been made to the child, who may therefore enforce it by an action in his own name. Clarke v. McFarland, 5 Dana, 45. Where all the contracts of a vessel, and all its transactions, are carried on in the name of one of the owners, he may sue alone ; the silent part owners need not be joined. Phillips v. Pennywit, 1 Ark. 59. An action will not lie on a contract by one of the justices of a county with the others in their official capacity. Justices of Tyrrel v. Simmons, 3 Jones L. 187. On a promise, under seal, made by A. to B., for the benefit of C., C. can not sue. Millard v. Baldwin, 3 Gray, 484. Where by the refusal of T. to fulfil a promise made to S. and G. to enter satisfaction of a judgment against them, the money was made on G.'s property alone,—held, that G. could recover in an action by himself alone for money paid. Taylor v. Gould, 57 Pa. St. 152. On an agreement made by one of the owners of a ship with the others, for one joint consideration, to perform certain services for them jointly, and also to procure insurance on their interests, either of them may sue him separately, for a failure to procure such insurance. Cleaves v. Lord, 3 Gray, 66. Upon a parol contract between S. and the defendant, whereby the latter, upon a consideration moving entirely from S., agreed to pay the daughter of S. a sum of money after the death of the latter,—held, that the daughter could not maintain either debt or assumpsit for the money. Only the representative of S. could maintain an action at law upon the contract. Ross v. Milne, 12 Leigh. 204. The legal interest in a contract is in

Moreover, the courts of law look in strict theory only to the parties on the record, *i. e.*, to the parties whose names appear on the pleadings, and "a cause must always be decided as if the parties on the record were the persons really interested." (*r*)[1] Hence, where A. [44] sues as trustee for B.. or in other words B. brings

(*r*) Com. Dig., Action, B. 38; Bauerman v. Radenius, 2 Smith L. C., 6th ed., 362.

the person to whom the promise is made, and from whom the consideration passes, and he is the person who must bring the action on such contract. Hall v. Huntoon, 17 Vt. 244; Lapham v. Green, 9 Vt. 407. The holder of a lottery-ticket may sue alone for a prize, although he had previously agreed to pay to another person half of what he should draw. Homer v. Whitman, 15 Mass. 132. Where a committee appointed by a school district to repair the school-house, took the job among themselves, each performing work and furnishing a separate portion of materials,—held, each may sue the district separately therefor. Geer v. School District of Richmond, 6 Vt. 76. Upon an obligation to two persons, either has a separate right of action. In an action by one of them, a demurrer would lie upon the ground that the petition failed to state a cause of action, unless the plaintiff averred an assignment from his co-payee. Quisenberry v. Artis, 1 Duv. 30. An action to recover money expended in organizing a railroad company, upon an agreement by the said company to sustain such expenses, is maintainable by the persons who have incurred the expense, alone, without joining the other parties to the agreement. Catawissa R. R. Co. v. Titus, 49 Pa. St. 277.

[1] See last note. The fact that a suit is for the benefit of a third person does not invest him with the legal right, and none but he who has the legal right can sue in his own name. Weathers v. Ray, 4 Dana, 474; Frankem v. Trimble, 5 Pa. St. 520. It is an inflexible rule that the question of jurisdiction must depend upon the party named in the record. Governor of Georgia v. Juan Madrazo, 1 Pet. 122; and see Governor v. Ball, 1 Hempst. 541; United States v. Sutter, 21 How. 170; Barkhamstead v. Parsons, 3 Conn. 1; Owsley v. Woolhopter, 14 Ga. 124; Hally v. Huggeford, 8 Pick. 73. If a person execute a written promise by a wrong name, he must be sued on the instrument in that name. Wooster v. Lyons, 5 Black, 60. Where a tract of land was granted by the name of Saville to certain individuals, who went on and divided portions of the

an action in A.'s name, though the action be in reality wholly for the benefit of B., A. being the party on the record, can not be looked upon as a mere cipher, and B.

same among themselves, leaving a part in common and undivided, and the name of the town was afterwards changed by the legislature to that of Wendell, and subsequently a portion of it was annexed to New London, and the name Wendell was afterwards changed to that of Sunapee,—held, that an action by the proprietors for the recovery of a portion of the tract should be brought in the name of "the proprietors of Saville." Sunapee v. Eastman, 32 N. H. 470. If A. agree with B. and C. to do certain work for them, B. and C. must join in an action against A. for a breach of his contract; and a partial payment by B. will not authorize him to maintain the action in his own name alone. Archer v. Bogue, 4 Ill. (3 Scam.) 526. Generally a trustee can not sue in his own name, but must associate with himself the party having the beneficial interest. Dunn v. Seymour, 11 N. J. Eq. (3 Stock.) 220. Where two or three partners in a mine make a contract with a person having no interest, under which he becomes entitled to a share of their interest and the profits, the two are the only parties necessary to be joined in an action to establish the rights of the party contracting, and to obtain a conveyance; if, however, an account of the mining partnership and a dissolution and severance of the interests of the several partners is sought for, all owning interests in the partnership are necessary parties, and the court may of its own motion order them to be brought in before a final disposition of the case. Settembre v. Putnam, 30 Cal. 490. The party who makes a contract, and performs the work under it, can recover in an action upon it in his own name, although he has a partner. Ship Potomac, 2 Black. 581. Where no declaration has been filed in the plaintiff's lifetime, and the suit has been continued after his death, under the Pennsylvania act of 1791, it must be filed in the name of the original party. Clow v. Brown, 1 Yeates (Pa.) 324. Where the suit is not brought in the name of the party contracting ostensibly, the defendant will be entitled to make any defense which he could have made had the suit been in the name of the person with whom the contract was made. Lapham v. Green, 9 Vt. 407. A receiver of partnership effects can not maintain an action of trover in his own name against a person who had converted assets of the firm, before his appointment; he must sue in the

will be bound by A.'s acts and admissions, and liable to defenses good as against A. (*s*) For "the plaintiff, though he says that he is a trustee of another, must, in a court of law, be treated in all respects as the party in the cause. If there is a defense against him, there is a defense against the cestui que trust who uses his name. (*t*) The following instance shows the strictness with which the party on the record is in some cases treated as the real party to the suit.

(*s*) The admission of equitable replications makes it now often possible for B. to dispose of such defenses.

(*t*) Gibson v. Winter, 5 B. & Ad. 102.

name of the firm, in whom was the legal right of action. Yeager v. Wallace, 44 Pa. St. 294. He who has the beneficial interest in a suit to recover a debt, may sue in the name of him who has the legal title. Berry v. Gillis, 17 N. H. 9. An action brought in the name of "A. B., cashier of a certain bank," is an action brought by A. B. individually, and the phrase "cashier," &c., is mere surplusage. Porter v. Newervis, 4 Rand. (Va.) 359. Where money is deposited with a stakeholder, on the event of a wager, by a person who acts as agent for several others, the stakeholder being ignorant of the principals on whose account the money is deposited, actions to recover back the money may be brought in the name of the principals, each of whom may sue separately for his portion, and not of the agent. Yates v. Foot, 12 Johns. (N. Y.) 1. The Tenn. act of 1825, ch. 29, which provides that "in all suits prosecuted in the name of one person for the use of another, the person for whose use the suit is brought shall be held the real party on record, against whom judgment shall be rendered and execution issue for costs, or in other cases," applies to courts of law only. Its object being to subject the party having the beneficial interest, to liability for costs; and to prevent the death of the nominal plaintiff from working an abatement, or requiring the suit to be revived in the name of the personal representative. Morrison v. Deaderick, 10 Humph. 342. An action to recover money expended from the treasury of a municipal corporation by the board of health in removing a nuisance, is properly brought in the name of the corporation. Salem v. Eastern R. R. Co., 98 Mass. 431. A person having a letter of attorney must sue in the name of the principal. Kinsey v. Hollinshead, 2 N. J. L. (1 Penn.) 380; Ward v. Wilkie, 3 N. J. L. (2 Penn.) 411.

The Statute of Frauds requires that a contract for the sale of goods should be signed by the party to be charged, or his agent. It is also settled on this statute that one contracting party can not sign as agent for the other. An auctioneer signed as agent for the party to be charged, *i. e.*, the purchaser of the goods. His signature was in itself sufficient; but the purchaser was sued for the price, not in the name of the vendor but in that of the auctioneer, (*u*) who of course sued for the benefit of the vendor. It was held that in such an action the contract could not be considered signed by an agent of the defendant's, since it was signed by the plaintiff, who must be treated as a party to the contract.

The general principle of the courts of law is to disregard equitable interests. A defendant may have an answer to a plaintiff's claim, which is perfectly good in a court of equity, and yet can not be made in a court of law,

[45] and a plaintiff who could completely dispose of a defendant's answer to his case in a court of equity, may not be able to reply to it in an action at law; but the application of this principle has by degrees been modified.

Independently of statute the common law courts are often compelled to recognize the rules of equity.

Thus, if an action be brought by a vendee for the deposit, the court will inquire whether the vendor's title would be good in equity. So, as the right of a person who has insured a ship and then sold it before loss, to sue upon the policy, depends upon the question whether or not he sues as a trustee for the vendee, such a person would not be allowed to recover in an action unless he is suing as a trustee. (*x*) In cases turning on the bankruptcy laws it frequently becomes necessary to take equitable as well as legal rights into consideration. If, for example, the bankruptcy of the plaintiff is pleaded, it is a good reply, independently of the statute allowing equitable replications, that the plaintiff is suing merely as

(*u*) Farebrother v. Simmons, 5 B. & Ald. 33, and see Chapter V.
(*x*) Powles v. Innes, 11 M. & W. 10.

a trustee, (*y*) since those things only pass to a trustee in bankruptcy in which the bankrupt is beneficially interested. (*z*) Statutes have still further extended the recognition of equitable interests, and in so far have broken in upon the rule that the courts look only to the parties on the record.

The Common Law Procedure Act, 1854, enacts that (*a*) "it shall be lawful for the defendant or plaintiff in replevin in any cause in any of the superior courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defense, and the said courts are hereby empowered to receive such defense by way of plea," (*b*) and that "the plaintiff may reply, in answer to any plea of the defend- [46] ant, facts which avoid such plea upon equitable grounds." (*c*)

Many defenses may now be pleaded which could not, before the statute, have been raised at common law. Thus, where a defendant has been made liable only by the occurrence of some mistake; (*d*) where a person who is a surety does not appear to be so on the face of the instrument; (*e*) and in other cases, defenses can be raised which would not formerly have been available in an action. The rights, again, and liabilities of assignees of debts who must sue in the name of their assignors, can now often be made to appear on the pleadings, and hence the rule, that each case must be decided as if the parties on the record were the only persons interested, often fails to hold good. This effect of the admission of equitable pleas, &c., is most clearly seen in the rules as to—

(*y*) Sims v. Thomas, 12 A. & E. 535; Boyd v. Mangles, 16 M. & W. 337; Parnham v. Hurst, 8 M. & W. 743; D'Arnay v Chesneau, 13 M. & W. 796.

(*z*) See Chapter IX.

(*a*) C. L. P. A., 1354, ss. 83, 85. See, also, Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144).

(*b*) C. L. P. A., 1854, s. 83.

(*c*) Common Law Procedure Act, 1854, s. 85.

(*d*) Wake v. Harrop, 1 H. & C. 202; 30 L. J. 273, Ex.; Steele v. Haddock, 10 Ex. 643; 24 L. J. 78, Ex.

(*e*) Pooley v. Harradine, 7 E. & B. 431; 26 L. J. 156, Q. B.

Set-off.—A defendant sued for a "debt" due to the plaintiff, may set-off debts due from the plaintiff to a trustee for the defendant; (*f*) and a debt due to the defendant from the person on whose behalf the plaintiff is suing as trustee. (*g*) But the defendant can not set-off debts due from the plaintiff where the latter is suing as trustee for a person to whom he has assigned the debt for which he is suing, and the set-off has accrued due subsequently to notice of the assignment, and in respect of an independent transaction. Such a set-off may be met by a replication that the plaintiff is suing on behalf of the assignee of the debt. (*h*)

The effect, therefore, on the right of set-off of
[47] admitting equitable pleas is, in an action by A. against X. for a debt, as follows:—

X. may set-off against the claim of A. a debt due from A., not to X., but to M., a trustee for X.

X. may set-off against the claim of A. a debt due to X., not from A., but from M. (the real plaintiff) on whose behalf A. is suing.

X. may not set-off a debt due to him from A., if A. is really suing on behalf of M. when the set-off has become due, subsequently to notice given to X. of the assignment, and in respect of an independent transaction.

But X. may set-off against the claim of A. (even though A. is suing as trustee for M.) debts due from A. to X. which have become due before notice of an assignment to M. of the debt for which the action is brought. (*i*)[1]

(*f*) Cochrane v. Green, 9 C. B., N. S., 448; 30 L. J. 97, C. P.

(*g*) Agra and Masterman's Bank v. Leighton, L. R. 2 Ex. 56; 36 L. J. 33, Ex.

(*h*) Watson v. Mid-Wales Rail. Co., L. R., 2 C. P. 593; 36 L. J. 285, C. P.

(*i*) Cavendish v. Geaves, 24 Beav. 163; 27 L. J. 314, Ch.

[1] But the set-off must be matter growing out of a contract, and a statute which allows "all demands mutually existing, . . . whether liquidated or not." Proper subjects of set-off will not apply to damages growing out of a conspiracy. Robinson v. L'Engle, 13 Fla. 482; and see Hall

From the words of the Common Law Procedure Act, 1854, it might be inferred that any defense or answer which is available in a court of equity could be pleaded in an action. But this is not so; for the right to use equitable pleas, replications, &c., is subject to the following restrictions:—

First. Courts of law will allow pleadings upon equitable grounds only where by the judgment at law they can do complete and final justice and settle all the equities between the parties; they have no jurisdiction to pronounce a temporary or conditional judgment, and no process by which terms or conditions can be enforced. Accordingly, they will allow a pleading on equitable grounds only where a court of equity under similar circumstances would decree an absolute, unconditional, and perpetual

v. Penny, Id. 621. A defendant can not set up as a counter-claim to an action that the action was brought maliciously, and a claim of damages for such malicious action. Noonan v. Orton, 29 Wis. 541. In Louisiana, under the civil law, a claim for unliquidated damages can not be set-off against an established debt. Pike v. Wells, 24 La. Ann. 208. A defendant in assumpsit may set off a judgment obtained by him, although an appeal therefrom is pending. Gladdis v. Leason, 55 Ill. 522. But as the holder of a check drawn by a third party on a bank has no action against the bank for its refusal to pay, he can not set-off the check against his note held by the bank. Case v. Henderson, 23 La. Ann. 49; Case v. Marchand, Id. 60. An individual account can not be set-off against a firm demand. Collier v. Dyer, 27 Ark. 478; and see Birdsall v. Fisher, 17 Minn. 100; and as between partner and third person, see West v. Kendrick, 46 Ga. 526; Byrd v. Charles, 3 S. C. 352. The note of a husband for property bought at an administrator's sale can not be set-off against a distributive share of the wife. Stewart v. Glenn, 3 Heisk. 581. Nor can a debt due from the assignor of a judgment to the defendant on the judgment be set-off by bill in equity against a bona fide holder of the judgment, without notice; but at law the rule would be otherwise. Catron v. Cross, 3 Heisk. 584. A counter-claim must be such a distinct cause of action as would justify a several judgment. Matteson v. Ellsworth, 28 Wis. 584.

[48] injunction; (*k*) that is, where a judgment in favor of the plaintiff, or in favor of the defendant (the only decision which a court of law can give), would dispose of the whole matter as between the parties to the action. It is, however, enough if the equitable grounds entitle the defendant to absolute and complete relief against the plaintiff, although against other parties, strangers to the action, equities remain unsettled. (*l*) But an equitable pleading will not be allowed where it is impossible to do justice without bringing other persons before the court. (*m*)

Many defenses, therefore, available in equity can not be pleaded, because a mere judgment for the plaintiff or for the defendant would not dispose of the matter between the parties. Thus, in an action on a covenant in a lease brought for rent and for not repairing a defense on equitable grounds of a part performed covenant to surrender, can not be pleaded, because in equity the defendant would be entitled to an injunction only upon terms of executing the surrender. (*n*) So a plea that the defendant signed a written contract under a mistake as to its contents can not be allowed, because the remedy in equity would be to reform the contract, (*o*) and numerous other examples might be given of pleas which on the same principle can not be pleaded.

Secondly. An equitable replication, &c., can not be allowed which sustains an equitable claim. If a plaintiff brings an action to which there is a good defense, but there are matters showing that he has a good equitable claim, he should go to a court of equity in the first instance. (*p*) For "an equitable replication can not be pleaded to a legal plea, if it merely shows that the plain-

(*k*) Bullen, Pleadings, 3rd ed., 568; Wodehouse v. Farebrother, 5 E. & B. 277; 25 L. J. 18, Q. B.; Mines Royal Society v. Magnay, 10 Ex. 489; 24 L. J. 7. Ex.; Jeffs v. Day, L. R. 1, Q. B. 372; 35 L. J. 99, Q. B.

(*l*) Sloper v. Cottrell, 6 E. & B. 501; 26 L. J. 7, Q. B.

(*m*) Schlumberger v. Lister, 30 L. J. 3, Q. B.; 2 E. & E. 870.

(*n*) Mines Royal Society v. Magnay, 10 Ex. 489; 24 L. J. 7, Ex.

(*o*) Perez v. Oleaga, 11 Ex. 506; 26 L. J. 65, Ex.

(*p*) Hunter v. Gibbons, 1 H. & N. 459. See judgment of BRAMWELL, B., 466; Bartlett v. Wells, 1 B. & S. 843; judgment of CROMPTON, J.

tiff has some right in equity which is ground for applying to a court of equity."

The meaning of this is, that though it is now [49] possible to raise equitable defenses, &c., in an action at law, it is not possible to commence an action in virtue of a merely equitable right. The law, to express the matter technically, allows equitable pleadings, but does not allow an equitable declaration. Hence, a plaintiff may show, on equitable grounds, that the defendant's plea or defense is inadmissible. But he can not make any reply to the defendant which shows that his own claim depends not on a legal, but on an equitable right. The statute has neither directly nor indirectly trenched upon the rule that no action can be brought except for the infringement of a legal or common law right.

Thus, in an action of trespass for digging minerals under the plaintiff's land, the defendant pleaded the Statute of Limitations, and the court refused to allow a replication that the trespasses were fraudulently concealed until within six years, because the replication showed that the legal right was barred, and the only right, if any, was a right in equity to an account. (*q*) So, in an action for goods sold, a replication on equitable grounds to the plea of infancy, that the defendant induced the plaintiff to supply the goods by fraudulently representing himself to be of full age, was held bad as setting up matter for a suit in equity instead of a cause of action at law ; (*r*) and in an action against an executor for goods sold to the testator, a replication on equitable grounds to a plea of the Statute of Limitations, that the causes of action accrued six years before the testator's death, and that he bequeathed to the defendant sufficient money on trust to pay his debts, was held bad. (*s*)

In some of these cases there were also other grounds for the decisions given, but they all recognise the principle, that where a plaintiff's case depends upon an

(*q*) Hunter v. Gibbons, 1 H. & N. 459 ; 26 L. J. 1, Ex.
(*r*) Bartlett v. Wells, 1 B. & S. 836 ; 31 L. J. 57, Q. B.
(*s*) Gulliver v. Gulliver, 1 H. & N. 174 ; 25 L. J. 341, Ex.

[50] equitable claim, he must go to a court of equity, and not bring an action at law. (*t*)

RULE 4.—An action may be brought for every infringement of a "legal" (*u*) right.[1]

"For all injuries done to a man's person, reputation or property, he shall have an action." (*x*) For everything, therefore, which is recognized by the common law as an "injury" in the widest sense of that term, as including within it both breaches of contract and torts, there is a right of action; or, in other words, any one who has suffered an invasion of his legal rights can bring an action against the person by whom they have been invaded.

"If a person has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed, it is a vain thing to imagine a right without a remedy; for want of right, and want of remedy are reciprocal. . . .

"Every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking of them, yet he shall have an action. So, if

(*t*) Bullen, Pleadings, 3rd ed., 566–574.

(*u*) See the foregoing rule as to the distinction between legal (or common law) and equitable rights.

(*x*) Bacon, Abr., Actions, B.

[1] With the exception that for wrongs against the public, an individual citizen can not bring his private action. Ayers v. Lawrence, 53 Barb. 454; Smith v. Heuston, 6 Ohio, 101. But the modification of this rule appears to have been allowed in cases where a special damage beyond his general damages as one of the community is suffered by plaintiff. Houch v. Wachler, 34 Md. 265; Enos v. Hamilton, 27 Wis. 256.

a man gives another a cuff on the ear, though it cost him nothing—no, not so much as a little diachylon—yet he shall have his action, for it is a personal injury. So, a man shall have an action against another for riding over his ground, though it do him no damage: for it is an invasion of his property, and the other has no right to come there; and in these cases the action is brought vi et armis. But for invasion of another's franchise, trespass vi et armis does not lie, but an action of trespass on the case: as where a man has retornia brevium, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it." (*z*)

"With respect to every description of rights" (it has been said), "actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to show the violation of a right, in which case, the law will presume damage." (*a*) [1]

The doctrine that every violation of a right, *i. e.*, every injury, is actionable, will be found perfectly correct, if it be remembered that rights are of two kinds; *i. e.*, that while some rights are rights to have certain acts done or left undone by other persons, other rights are merely rights not to be materially or perceptibly damaged by certain acts or omissions on the part of others. To put the same thing in another form, some acts are infringements upon rights, *i. e.*, are actionable, whether they inflict damage or loss upon the person aggrieved or not; other acts become infringements on rights, *i. e.*, are actionable, only in consequence of causing actual damage or loss.

The same distinction is sometimes put in a different form. To make up a cause of action there must exist, it is said, both damage and injury, and as an action does not lie for damage without injury, so also it does not lie for injury without damage.

(*z*) Ashby v. White, 1 Smith, L. C., 6th ed., 249, 250, per HOLT, C. J.

(*a*) Lambert v. Bessey, 4 Edw. IV., folio 7, cited Smith v. Kenrick, 18 L. J. 175, C. P.

[1] See last note.

But in order to make the distinction as thus stated hold good, the word damage must be used ambiguously, as meaning sometimes actual perceptible loss, and sometimes what is called damage implied by law;
[52] *i. e.*, loss which, though it may not actually exist, is assumed by a fiction of law always to exist as the result of certain proceedings; *e. g.*, a breach of contract, an assault, &c.: and, though it is true that no action lies except for some act accompanied either by actual damage or by damage implied by law, still the fact remains, that certain acts are considered by the law always to cause damage (whether they really cause it or not), and, therefore, are always actionable; whilst other acts are considered injurious, and are therefore actionable only when they cause actual or perceptible damage.

Hence, in whatever shape the distinction insisted upon be expressed, it comes, in fact, to the same thing; *i. e.*, that some acts are injurious and actionable, whether they cause damage or not, whilst other acts become injuries, and therefore actionable, only on account of the damage which they cause.

"There is no doubt," it has been said, "that the right of action accrues whenever a person interferes with his neighbor's rights, as for example, by stepping on his land, or . . . . interfering with his right to vote, and this though no actual damage may result. But for a man to dig a hole on his own land is a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbor, and since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of an appreciable amount. A person may build a chimney in front of your drawing-room, and the smoke from it may annoy you, or he may carry on a trade next door to your house, the noise of which may be inconvenient; but unless the smoke or noise be such as to do you appreciable damage, you have no right of action against him for what is in itself a lawful act." (*b*)

(*b*) Smith v. Thackerah, L. R. 1, C. P. 566; per ERLE, C. J.

It is impossible to lay down any decisive test by which to distinguish acts which are injuries, and therefore actionable in themselves, from acts which are not injuries in themselves, but which become in- [53] juries, and therefore actionable, only when they cause damage.

The characteristic by which some acts which are injuries in themselves may be known is, that they would, if continued, bar the legal rights of the person aggrieved by them. Thus a trespass on a person's lands, interference with the rights of commoners, the diversion of a stream of water, would, if repeated, bar the legal rights of the land-owner, the commoner, or the persons entitled to the use of the stream. Hence, for such acts an action may be brought by a person aggrieved, even though he suffers no material damage or loss thereby. (*c*)

The meaning of the rule, as well as the difference between acts which are actionable in themselves, and acts which are actionable only when they cause damage, is best seen from examples.

A breach of contract is always an injury, and, therefore, upon the breach of a contract, a right of action vests without any special damage, and the plaintiff is entitled to have a verdict for nominal damages, even though he does not prove any actual damage at the trial. (*d*)

These nominal damages are so pure a fiction that when the claim (*e. g.*, a debt) due upon a contract has been paid, the creditor can not sue for nominal damages for its detention.

The right to sue for every breach of contract is independent of the nature of the contract sued upon. The agreement may be express or implied, it may be made by deed, or by word of mouth, but whatever its nature, it will always give a right of action when broken. Even an action in form for tort, if it be in substance an action for breach of contract, will lie, even though no actual damage

(*c*) Harrop v. Hirst, L. R. 4, Ex. 43; 38 L. J. 1, Ex.

(*d*) Marzetti v. Williams, 1 B. & Ad. 423, judgment of TENTERDEN, C. J., Beaumont v. Greathead, 2 C. B. 494; 15 L. J. 130, C. P.

has arisen from the breach ; (*e*) the principle being, that a person who makes a contract is bound to perform it,
[54] and if he does not do so, is liable to an action for his neglect of duty. (*f*)

An assault, trespass to land, conversion of goods, or the publication of a libel, are in themselves injuries, and actionable, irrespective of the damage which they may cause.

Acts of fraud, on the other hand, or negligence, are not necessarily injurious, and only become so by reason of actual damage or loss caused to the person aggrieved.

The distinction between acts actionable in themselves, and acts actionable because they cause loss, is seen in the difference between libel and slander.

Libel, or the publication by one person, by means of printing, writing, pictures, or the like signs, of matter defamatory to another (*g*) is actionable, whether it cause damage to the person libeled or not. Slander, or the utterance by one person, by means of words spoken, of matter defamatory to another (*h*) is (subject to certain exceptions) not actionable, unless actual loss is caused to the person slandered. In other words, a man has a right to insist absolutely, that defamatory matter tending to disparage him shall not be published in print, and if such matter be published, he may bring an action for such publication irrespective of its results. But a man has not a right to insist absolutely that nothing defamatory shall be said of him. The whole extent of his right is the right not to be damnified by the utterence of defamatory matter. He can not, therefore, bring an action for slander unless the slander has caused him actual loss. To publish in print of another, that he is a low fellow, a blackguard, a disgrace to the town, &c., is actionable ; to

(*e*) Marzetti v. Williams, 1 B. & Ad. 414.

(*f*) Compare Baily v. De Crespigny, L. R. 4, Q. B. 185. Canham v. Barry 24 L. J. 106, C. P., judgment of MAULE, J. ; Mayor of Berwick v. Oswald, 3 E & B. 665 ; 23 L. J. 24, Q. B.

(*g*) 3 Bl. Com. 125.

(*h*) Ibid. 123 ; Bullen, Pleadings, 3rd ed., 301, 302.

say the same things of another, is not actionable, unless actual damage result to him from the language used.

Causes of Action arising beyond the Jurisdiction.

A person may have a cause of action against another on account of matters which took place either [55] in part or wholly without the jurisdiction of our courts; *e. g.*, for the breach of a contract made in Scotland, or for an assault committed in France.

The general principle is, that a local (*i*) action can not be brought in respect of a cause of action arising beyond the jurisdiction of our courts; but that a transitory action can be brougnt by any person whatever in respect of causes of action arising either wholly or in part beyond their jurisdiction.[1]

The effect of this principle is, that an action does not lie for any wrong connected with land situated out of England,—*e. g.*, for the forcible entry into a house in Canada; but that an action does lie for the breach of any contract made or assault committed,—*e. g.*, in Scotland or in France.

Nothing depends upon the nationality of the parties. (*j*)[2]

The right of an Englishman to sue a foreigner, or of one foreigner to sue another, or to sue an Englishman, for the breach of a contract made abroad has long been completely established.

The right of aliens to sue, and their liability to be sued in our courts for wrongs committed abroad, is now equally well settled. "The right of all persons, whether British subjects or aliens, to sue in the English Courts for damages in respect of torts committed in foreign countries, has long since been established; and as is observed in the

(*i*) *Ante.*

(*j*) As to alien enemies, see p.

[1] Lownsdall v. Portland, Deady, 1.

[2] See Crane v. Reeder, 25 Mich. 303. See Morgan's Addison on Contracts, vol. i., §§ 193, 194.

notes to Mostyn v. Fabrigas, (*k*) there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and
[56] also by the law of the country where they are committed, and the impression which long prevailed to the contrary seems to be erroneous." (*l*)

(*k*) 1 Smith, L. C., 6th ed., 656.
(*l*) The Halley, L. R., 2 P. C. 203; per CURIAM.

[1] As a general rule, an alien friend can sue in the courts of the United States any personal action, the same as if he were a citizen. Taylor v. Carpenter, 3 Story, 458; 2 Woodb. & M. 1; Society, &c., v. Wheeler, 2 Gall. 127; Coffeen v. Brunton, 4 McLean, 516. Nor does an alien lose his right to sue in the Federal courts by residence in one of the states. Breedlove v. Nicolet, 7 Pet. 413; Bonapart v. Camden, &c., R. R. Co., 1 Baldw. 216. If he hold land under the law of a state, he may bring a suit to protect it. Id. An alien whose rights are guaranteed to him by treaty, and who is thereby competent to hold real estate, is competent to maintain an action to recover it. Doe v. Brown, 7 N. J. L. 305; see Bradstreet v. Supervisor, &c., 13 Wend. 546; and an alien is entitled to bring an action of ejectment; Ronce v. Williamson, 3 Ired. L. 141; Young v. Peck, 21 Wend. 389; 26 Id. 613; Jackson v. Britton, 4 Id. 507; but see Bayes v. Hogg, 1 Hayw. 485. In North Carolina, which holds that he can not maintain ejectment, but may bring his suit for trespass quare clausum fregit, plaintiff in an action to try titles, claiming as heir at law of an American citizen, proved that he himself was an alien—held a ground of non-suit without a plea in abatement. Ennos v. Franklin, 2 Brev. 398. In the case of a mortgage, when the debt is considered the principal and the land the incident, an alien, if not an alien enemy, may bring a suit for foreclosure. Hughes v. Edwards, 9 Wheat. 489. One alien may sue another in the courts of Massachusets upon a contract made abroad, when both are transiently within the state. Roberts v. Knights, 7 Allen, 449. But see as to this as ground of abatement in other states; Dammossay v. Delvrit, 3 Har. & J (Md.) 157; Straumburg v. Heckman, Busb. (N. C.) L. 250; Brinley v. Avery, Kirby (Conn.) 25. A plea of alienage if imposed to a real action goes in general to defeat the right of action altogether. White v

Foreigners can be sued and (it is presumed) sue in this country for wrongs committed on the high seas. (*m*)

The statement that an action always lies in our courts for transitory matters, whatever the place in which the grievance was committed, must be taken, as regards both actions ex contractu and actions ex delicto, subject to certain limitations.

A person may bring an action on a contract made abroad, but the courts here in judging of the validity of the contract will follow the law with reference to which the parties may be presumed to have contracted; *i. e.* (in almost all cases), the law of the country in which the con

(*m*) Submarine Telegraph Co. v. Dickson, 33 L. J. 139, C. P.; 15 C. B., N S. 729.

Sabarrego, 23 Tex. 243. An empressario authorized to sue the state by statute, is not bound to allege that he is a citizen; if the disability existed, it should have been shown in defense. And the admission of the empressario plaintiff, that he parties in interest (for whose use he sued) resided in the state of New York, would not authorize the presumption that they were aliens when the statute authorizing aliens to sue was passed. State v. Burnett, 9 Tex. 48. Where an alien sues a corporation, it is no objection that one of the stockholders is also an alien, if the agents of the corporation are also defendant. Bonapart v. Camden, &c., R. R. Co., 1 Baldw. 216. The alienage of a plaintiff is a cause in abatement, and must be so pleaded, except that in a real action alien enemy may be pleaded either in bar or in abatement. Levnie v. Taylor, 12 Mass. 8; Sewall v. Lee, 9 Id. 363; Martin v. Woods, Id. 377; Ainslee v. Martin, Id. 454; Hutchinson v. Brock, 11 Id. 119. An alien could not sue the president of the republic of Texas, and therefore, under the Texas statutes of April 25, 1846, can not sue the governor of the state. Rose v. Governor, 24 Tex. 496. An alien found within the state is liable to be sued in its courts on all his contracts wherever made. Barrel v. Benjamin, 15 Mass. 354. And an alien is entitled to have a cause to which he is a party, removed to the circuit court of the United States from a state court, although a motion for an attachment for infringement of an injunction is pending in the state court. Byam v. Stevens, 4 Edw. Ch. 119.

tract was made. On the other hand, questions of procedure are governed by the law of the country in which the action is brought. Hence, the general rule is, that in interpreting a contract made abroad, the courts will follow what is called the lex loci, *i. e.*, the law of the place in which the contract was made. (*n*) But, on the other hand, as to questions of procedure, they are governed by the lex fori, *i. e.*, the law of the country in which the action is brought. "The distinction that is laid down in all cases of this description is between the cause of action which is to be judged of with reference to the law of the country where it originated, and the mode of procedure which must be adopted as it happens to exist in the country where the action is brought." (*o*) "The rule which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made. The mode of suing, and the time within [57] which the action must be brought, must be governed by the law of the country where the action is brought." (*p*)

For example, a contract made in France, (*q*) or in Scotland, (*r*) is held valid here if valid in France or Scotland; and invalid here if invalid in France or Scotland. On the other hand, if barred here by the Statute of Limitations, it can not be sued upon in our courts, even though in France or in Scotland it would not be barred by any Statute of Limitations. (*s*) [1]

(*n*) Lloyd v. Guibert, 35 L. J. 74, Q. B.; L. R., 1 Q. B. 115 (Ex. Ch.).
(*o*) 1 Smith, L. C., 6th ed., 657.
(*p*) Trimbey v. Vignier, 1 Bing. (N. C.) 159, judgment of TINDAL, C. J.
(*q*) Ibid.
(*r*) British Linen Co. v. Drummond, 10 B. & C. 903.
(*s*) Ibid.; De la Vega v. Vianna, 1 B. & Ad. 284.

[1] A contract made in one state, to be fulfilled there, subject to ratification in another, is, when ratified, to be interpreted by the laws of the first state. Galsen v. Ebert, 52 Mo. 240; Hildreth v. Shepard, 65 Barb. 265; and see Drew v. Smith, 59

It is doubtful whether, if an Englishman contracts with a foreigner abroad to do an act not contrary to the law of a foreign country, but contrary to the law of England, the foreigner may maintain an action in England. (*t*) It appears, however, clear that "as to foreign law, which we respect, there has always been an exception of foreign laws in conflict with our own laws on subjects of religion and morality." (*u*)

A person may sue here for a tort committed abroad, provided that the act complained of is a tort (or at least unlawful), at the place where it was done, and is also a tort according to English law. But no one can bring an action for tort in our courts for any act which is not both unlawful at the place where it was done, (*x*) and also a tort here. (*z*)

It is settled, that an action lies in England for a tort committed abroad; *e. g.*, for an assault at Naples. (*a*)

That an action does not lie for an act which, though wrongful here, is lawful in the country [58] where it is done, is established by the judgment of

(*t*) Santos v. Illidge, 6 C. B., N. S., 841; 26 L. J. 3, Q. B.; 8 C. B., N. S. 861; 29 L. J. 349, Q. B. (Ex. Ch.).

(*u*) Emperor of Austria v. Day, 30 L. J. 707 (Ch.), per CAMPBELL, Ch.

(*x*) Phillips v. Eyre, L. R. 4, Q. B. 225; 38 L. J. 113, Q. B.

(*z*) The Halley, L. R. 2, P. C. 193; 37 L. J. 33, Ad. Affirmed in Exchequer chamber, Weekly Notes, 1870, 177.

(*a*) Scott v. Seymour, 2 H. & C. 219; 31 L. J. 457, Ex.; 2 H. & C. 231; 32 L. J. 61, Ex. (Ex. Ch.)

Me. 393; Partee v. Silliman, 44 Miss. 293. If there is a doubt as to the place, the intention of the parties will also be considered. Hyatt v. Bank of Kentucky, 8 Bush. 193; or the law of the place where the suit is brought; Laird v. Hodges, 26 Ark. 365. When a contract is made by a common carrier in one state to transport goods into another, and the goods are lost, the rights of the parties are governed by the law of the state in which the loss occurred. Gray v. Jackson, 54 N. H. 9. And so in a suit upon a promissory note, as between maker and payee, the law of the state in which it is regarded as commercial paper will control. Hyatt v. Bank of Kentucky, 8 Bush. 193.

the Queen's Bench, in Phillips v. Eyre, (*b*) from which the following quotation is taken:

"It may be useful to consider what would have been the effect if . . . . the legislature of Jamaica, in anticipation of future events, had passed a statute authorizing the acts which have given rise to this action. We can not doubt that in such a case no right of action would arise here. It appears to us clear that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law if committed here, can not be made the ground of an action in an English Court. The rule which obtains in respect of property and civil contracts, namely, that an act, unless intended to take effect elsewhere shall, as regards its effect and incidents, if a conflict of law arises between the lex loci and the lex fori, be governed by the former, appears to us applicable to the case of an act occasioning personal injury. To hold the contrary, would be attended with the most inconvenient and startling consequences, and would be altogether contrary to the comity of nations in matter of law, to which effect should, if possible, be given. An act might not only be lawful, but might even be enjoined by the law of another country, which would be wrongful, and give a right of action by our law, and it certainly would be in the highest degree unjust, that an individual who has intended to obey the law binding upon him, should be held liable in damages in another country where a different law may prevail. Thus, an arrest and imprisonment might be perfectly justified by the law of a foreign country under circumstances in which it would not be justifiable here. It would be impossible to hold that in such a case an action could be maintained in an English court.

"The same reasoning will apply where an act,
[59] though not enjoined is yet authorized and rendered lawful by the law of the country where it is done. There will have been no intention to inflict a wrong in

(*b*) L. R. 4, Q. B. 225; 38 L. J. 113, Q. B.

such a case, nor according to the law of a particular country will any right have been infringed." (*c*)

A judgment (*d*) of the Privy Council decides that no action lies here for an act, which though a wrong in the country where it was committed, would not be a wrong if done in England.

"The liability of the appellants, and the right of the respondents to recover damages from them as the owners of the 'Halley,' if such liability or right exists in the present case, must be the creature of the Belgian law, and the question is, whether an English court of justice is bound to apply and enforce that law in a case when, according to its own principles, no wrong has been committed by the defendants, and no right of action against them exists. . . .

"It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where by express reference, or by necessary implication, the foreign law is incorporated with the contract; and proof and consideration of the foreign law, therefore, becomes necessary to the construction of the contract itself; and as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases, the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is in their lordships' opinion, [60] alike contrary to principle and to authority to hold that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of

(*c*) Phillips v. Eyre, L. R. 4, Q. B. 237, per CURIAM.
(*d*) The Halley, L. R. 2, P. C. 193.

damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed." (*e*)

It is still an open question whether—" where an act which, though not authorized by the lex loci, yet gives no right of action, as where that act is punishable by criminal proceedings, but gives no right to damages, but such act by the law of this country would give a right to damages, as in such a case no conflict of law would arise, —an action might" [or might not], "be maintained in an English court." (*f*)

An assault committed at Naples, (*g*) where it was unlawful, or at any rate not shown to be lawful, has been held to give a right of action here. An assault committed in Jamaica (*h*) under circumstances which would in England give a cause of action, but authorized, though subsequently to its commission, by the laws of Jamaica, has been held to give no cause of action in England; and an act (*i. e.*, the running down of a ship in Belgian waters), which gave rise to a right of action in Belgium, has been held not actionable here, because the facts of the case would, if the accident had occurred in England, have exempted the defendants from liability. (*i*)

The rule then that transitory actions can be brought here in respect of causes of action which have arisen abroad, is not applied in the same manner when the cause of action is a breach of contract, as when it is a tort.

[61] A contract, which would be invalid if made in England, generally speaking, supports an action if it is valid at the place where it is made. But no action can be brought for an act, which, though a tort at the place where it was done, is not considered a tort by English law.

(*e*) The Halley, L. R. 2, P. C. 202, 203, 204, judgment of Privy Council.

(*f*) Phillips v. Eyre, L. R. 4, Q. B. 239, 240, per CURIAM.

(*g*) Scott v. Seymour, 2 H. & C. 219; 31 L. J. 457, Ex.; 2 H. & C. 231; 32 L. J. 61, Ex. (Ex. Ch.)

(*h*) Phillips v. Eyre, L. R. 4, Q. B. 225; 38 L. J. 133, Q. B.

(*i*) The Halley, L. R. 2, P. C. 193; 37 L. J. 33, Ad.

Exception 1.—Where an injurious act amounts to a public nuisance.

A public nuisance—*e. g.*, an obstruction to a highway, a noxious trade, &c.,—is an indictable offense, and the proper remedy for it being an indictment, no action will lie for such a public nuisance at the suit of a private person unless he has sustained damage by it over and above what is common to others. (*k*)[1] No action, therefore, lies for merely placing an obstruction on a public highway, but a person damaged by driving or falling against it may maintain an action for the damage done to him. (*l*)

It may be hard to determine whether the plaintiff has or has not suffered a particular damage above what is common to the public.

A person who in consequence of an obstruction to the highway has been hindered from access to his colliery, or impeded in his business, (*m*) or deprived of tenants, (*n*)

(*k*) 3 Bl. Com. 220; Bullen, Pleadings, 3rd ed., 377.

(*l*) Ashby v. White, 1 Smith, L. C., 6th ed. 250, 251, judgment of HOLT, C. J.

(*m*) Iveson v. Moore, 1 Ld. Raym. 486.

(*n*) Baker v. Moore, Ibid. Compare for this and the preceding note Ricket's Case, L. R. 2, H. L. 187; 36 L. J. 205, Q. B.; Beckett v. Midland Rail. Co., L. R. 3, C. P. 97–100, judgment of WILLES, J., and Com. Dig., Action on the Case, A.

[1] See *ante*, note 1, p. 62. Powers v. Spear, 3 N. H. 36. Individuals can not proceed in equity to enforce rights purely public. Smith v. Heuston, 6 Ohio, 101. But while persons having distinct, separate, and independent claims can not be compelled to prosecute them in a single suit; Merrill v. Lake, 16 Ohio, 373; a bill in equity to enforce the performance of public duties by a corporation, can not be maintained by a private party in the absence of a special right or authority; Buck Mountain, &c., Co. v. Lehigh, &c., Co., 50 Pa. St. 91. There is no joint interest in a penalty unless expressly so given by statute. Vinton v. Welsh, 9 Pick. 87; Hill v. Davis, 4 Mass. 137. But a bill may be maintained against a portion of a numerous body of defendants representing a common interest. Smith v. Swormstedt, 16 How. 288; West v. Randall, 2 Mass. 181; Carey v. Hoxey, 11 Ga. 645; Hendrix v Money, 1 Bush. (Ky.) 306; Stimson v. Lewis, 36 Vt. 91.

or hindered from carrying tithes, (*o*) has been considered to be injured. But where an obstruction to a highway has merely delayed one person in common with others, (*p*) or has delayed him more frequently than others,
[62] (*q*) or has damaged his trade, (*r*) he has been held to have suffered no special damage.

It is necessary, however, to distinguish from public nuisances acts which do not amount to a public nuisance, but infringe upon the rights of a class of persons. For such acts each person of the class whose rights are invaded may have an action, and if the act complained of would, by its repetition or continuance, furnish evidence in derogation of the plaintiff's legal rights, he may sue without showing any actual personal damage to himself whatever. (*s*)

When, therefore, a person, by wrongfully depasturing cattle on a common, infringes upon the rights of all the commoners, each commoner may sue him without proving any specific damage to himself, because "the law considers the right of the commoner is injured by such an act, and, therefore, allows him to bring an action for it to prevent a wrong-doer from gaining a right by repeated acts of encroachment. For whenever any act injures another's right, and would be evidence in future in favor of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury." (*t*) And so where the plaintiffs, in common with other inhabitants of a particular district, enjoyed a customary right at all times to have water from a spout in a highway in the district, for domestic purposes, and the defendant, a riparian proprietor on the stream which supplied the

(*o*) Hart v. Bassett, 4 Viner, 517.

(*p*) Winterbottom v. Ld. Derby, L. R. 2, Ex. 316; 36 L. J. 194, Ex; Greasley v. Codlin, 2 Bing. 263.

(*q*) Caledonian Rail. Co. v. Ogilvy, 2 Macq. 229.

(*r*) Ricket's Case, L. R. 2, H. L. 175; 36 L. J. 205, Q. B.

(*s*) Harrop v. Hirst, L. R. 4, Ex. 43; 38 L. J. 1, Ex.; Mellor v. Spateman, 1 Wms. Saund, 346*a*.

(*t*) Mellor v. Spateman, 1 Wms. Saund. 346*a*; Harrop v. Hirst, L. R. 4, Ex. 46; judgment of KELLY, C. B.

spout with water, on various occasions prevented such large quantities of water from reaching the spout, as to render what remained insufficient for the needs of the inhabitants, it was held that the plaintiffs, who themselves had suffered no personal damage or inconvenience, might maintain an action against the wrong-doer. (*u*) [63]

"Where many men are offended by one particular act, there they must proceed by way of indictment, and not of action; for in that case the law will not multiply actions. But it is otherwise where one man only is offended by that act, he shall have his action; as if a man dig a pit in a common, every commoner shall have an action on the case, ... for every commoner has a several right. But it would be otherwise if a man dig a pit in a highway. Every man shall not bring his action, but the party shall be punished by indictment, because the injury is general and common to all that pass." (*x*)

"It is conceded that where an indictment may be maintained, there is no remedy by action without proof of individual damage. But the same principle does not apply where the injury complained of is not one affecting the public generally, but only a particular class or section of persons. It is also conceded that the infringement of a right furnishes a cause of action, but it is said there must be damage of some sort proved particular to the person who sues. Now here the jury have found that the inhabitants of the district in question, and the plaintiffs among them, have a right; and also that the defendant has at times interfered with that right, but they have also found that the plaintiffs have personally suffered no loss either pecuniarily or by waste of time in going to fetch water in vain or otherwise. Neither in time nor money have they incurred any appreciable inconvenience. It is, however, admitted that any inhabitant who had actually been injured by the circumstance that the supply of water had been lessened might have maintained an action. But it appears to me that the mere fact of ab-

(*u*) Harrop v. Hirst, L. R. 4, Ex. 43; 38 L. J. 1, Ex.
(*x*) Ashby v. White, 2 Smith, L. C., 6th ed., 239, per HOLT, C. J.

stracting from time to time the supply of water to which the inhabitants of the district were justly entitled might furnish some evidence in derogation of the rights [64] of those inhabitants, whether on this or that particular occasion they suffered actual damage or not. On that ground . . . . the plaintiffs are entitled to recover in this action,—on the ground, that is to say, that the act of the defendant was one which derogated, or might hereafter derogate, from their legal right." (*y*)

Exception 2.—Where the wrong done amounts to a felony.

A person who is wronged by another can not, if the wrong amounts to a felony, bring an action against the wrong-doer until he has prosecuted him for the felony. (*z*)

If X. take goods from A. under circumstances which make the act amount to larceny; or if X. make an assault upon A. which amounts to a rape, A. can not sue X. in an action of trover, or for assault, until A. has prosecuted X. for the felony; and if it appear at the trial that the act for which the action is brought is a felony, the judge will nonsuit the plaintiff. (*a*)

This rule does not prevent actions against others than the felon himself. Thus if X. steals goods from A. and sells them (not in market overt) to Y., who buys them without knowing they are stolen, A. may bring an action of trover against Y. although he has not prosecuted X. (*b*)

"There is [a] rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action; not that he shall not maintain a civil action to recover from the third and innocent person that which has been feloniously taken from him—for this he may do if there has not been a sale in market overt—but that he shall not sue the felon; and it may be admitted

(*y*) Harrop v, Hirst L. R. 4, Ex. 47, 48, judgment of CHANNEL, B.

(*z*) Ashby v. White, 1 Smith, L. C., 6th ed., 267; Wellock v. Constantine, 2 H. & C. 146; 32 L. J. 285, Ex.

(*a*) Wellock v. Constantine, 2 H. & C. 146; 32 L. J. 285, Ex.

(*b*) White v. Spettigue, 13 M. & W. 603.

that he shall not sue others together with the felon in a proceeding to which the felon is a necessary part *f*, and wherein his claim appears by his own showing to be founded on the felony of the defendant. (*c*) This [65] is the whole extent of the rule." (*d*)

It is said that a master whose servant is killed can not sue until the possible felony is inquired into. (*e*)

The statute 9 & 10 Vict. c. 93, for compensating the families of persons killed by accidents, expressly enacts that the general rule shall not apply to actions brought under the statute.

RULE 5.—The same person can not be both plaintiff and defendant.[1]

"It is clear upon the acknowledged principles of pleading in the Common Law, that a party can not at once be a plaintiff and a defendant in the same action; or, in other words, sue himself either alone or in conjunction with others." (*f*)

The rule that a person can not sue himself scarcely requires explanation, and results immediately from the fact that it is impossible for a man himself to infringe upon his own rights, or do himself an injury in the legal sense of the term. But as a rule of law it has the further application that where two or more persons must join as plaintiffs in an action, they can not bring any action in

(*c*) Gibson v. Minet, 1 H. Bl. 612.

(*d*) Stone v. Marsh, 6 B. & C. 564, judgment of Lord TENTERDEN, C. J.; White v. Spettigue, 13 M. & W. 603; Lee v. Bayes, 18 C. B. 602.

(*e*) Com. Dig., Action on the Case, B. 5.

(*f*) Story, Partnership, s. 221; Jones v. Yates, 9 B. & C. 532.

[1] Either solely or with others. Pearson v. Nesbitt, 1 Dev. L. 315; Eastman v. Wright, 6 Pick. 316. But a remedy, in such case, might be had in a court of equity. Livingston v. Livingston, 2 Treadw. (S. C.) Const. 428. Equity will not decree between parties having adverse interests where the same person represents both parties. Ford v. Whedbee, 1 Dev. & B (N. C.) L. 16.

which it would be necessary to make one of them defendants.

A plea to an action by A. and B. against X. that B. is liable with X. on the contract sued upon, is an answer to the action. So where an individual is a common partner in two houses of trade, no action can be maintained by the one house against the other upon any transactions which take place between them whilst such individual is a common partner, and that, whether the action be brought during his lifetime or after his death. (*h*)

[66]

RULE 6.—The right to bring an action can not be transferred or assigned.[1]

This rule is involved in the maxim, "a chose in action is not assignable."

(*h*) Cabell v. Vaughan, 1 Wms. Saund. 291, n. (*i*); compare Lindley, Partnership, 2nd ed., 488. See Rule 22.

[1] As to what parties will have no standing in court on account of contracts void, for maintenance or champertous in the United States, see Stanley v. Jones, 7 Bing. 369; Thurston v. Percival, 1 Pick. 415; Lathrop v. Amherst Bank, 9 Metc. 489, an excellent case on this subject; Byrd v. Odem, 9 Ala. 755; Satterlee v. Frazer, 2 Sandf. 141; Holloway v. Lowe, 7 Porter, 488; Key v. Vattier, 1 Ham. 58; Rust v. Larue, 4 Litt. 417; Evans v. Bell, 6 Dana, 479; Wilhite v. Roberts, 4 Id. 172; Mahoney v. Bergin, 41 Cal. 423; The English Statutes, 42 Hen. VIII., c. 9, which forbade the purchase of a doubtful title by a stranger by one not in possession, was re-enacted in many of the states, and in others adopted by practice (Parsons on C. ii. 767), and see Brinley v. Whiting, 5 Pick. 353; Whitaker v. Cone, 2 Johns. Cas. 58; Belding v. Pitkin, 2 Caines, 147; McGoon v. Ankeny, 11 Ill. 558. But see Cresinger v. Lessee of Welsh, 15 Ohio, 156; Edwards v Parkhurst, 21 Vt. 472; Dunbar v. McFall, 9 Humph. 505; Sessions v. Reynolds, 7 Smedes & M. 132; Frizzle v. Veach, 1 Dana, 211; Stoever v. Whitman, 6 Binn. 416; Hadduck v. Wilmarth, 5 N H. 181. As to maintenance, see Call v. Calef, 13 Metc. 362

Property in chattels personal is either in possession or else in action.

Property in possession is where a man has the enjoyment, either actual or constructive, of the thing or chattel. (*i*)

"Property in action is where a man has not the enjoyment, either actual or constructive, of the thing in question, but merely a right to recover it by suit or action at law, from whence the thing so recoverable is called a thing (or chose) in action. Thus money due on a bond is a chose in action, for a right to claim money vests whenever it becomes payable, but there is no possession until recovered by course of law, unless payment be first voluntarily made. And so, if a man promises and covenants

(*i*) 2 Steph., Com., 6th ed., 10.

Perine v. Dunn, 3 Johns. Ch. 508; Thalheimer v. Brinckerhoff, 3 Cow. 647. As strictly between attorney and client, for purchases by the attorney, consult Lathrop v. Amherst Bank, 9 Metc. 489; Thurston v. Perceval, 1 Pick. 415; Redman v. Sanders, 2 Dana (Ky.) 70; Frost v. Paine, 12 Me. (3 Fairf.) 111; Lafferty v. Jelley, 22 Ind. 471; Brown v. Beauchamp, 57 B. Mon. 413; Knight v. Sawin, 6 Metc. (Greenl.) 361; Thompson v. Warren, 8 B. Mon. 488; Arden v. Patterson, 5 Johns. 44; McMicken v. Perrin, 18 How. 507; Burt v. Place, 6 Cow. 431; Gilleland v. Failing, 5 Den. 308; Gidding v. Eastman, 1 Clark (N. Y.) 19; Sedgwick v. Stanton, 14 N. Y. 289; Brotherson v. Consalaus, 26 How. Pr. 213; Martin v. Amos, 13 Ired. L. (N. C.) 201; Barnes v. Strong, 1 Jones Eq. (N. C.) 100; Spencer v. King, 5 Ohio, 183; Ryan v. Martin, 16 Wis. 57; Moore v. Campbell Academy, 9 Yerger, 115; Byrd v. Odem, 9 Ala. 755; Scobey v. Ross, 13 Ind. 177; Coquelland v. Bearss, 21 Id. 479; Slader v. Rhodes, 2 Dev. & B. Eq. (N. C.) 24; Weedon v. Wallace, Meigs (Tenn.) 286; Stone v. Connelly, 1 Metc. (Ky.) 625. But where the persons interested are so numerous as to make it impossible, or very inconvenient, to bring them all before the court, a part of them may file a bill in behalf of themselves and all others standing in the same situation. Robinson v. Smith, 3 Paige, 222; Vann v. Hargett, 2 Dev. & B Eq. 37.

with me to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action. For though a right to some recompense vests in me at the time of damage done, yet how large such recompense shall be can only be ascertained by verdict, and the possession can only be given me by legal judgment and execution. A chose in action, then, is a thing rather in potentiâ than in esse, though the owner may have as absolute a property in, and be as well entitled to, such things in action as to things in possession." (*k*)

[67] A chose in action has also been defined, (*m*) as any "personal right, not reduced into possession, but recoverable by law." Hence, "money due on a bond, note, or other contract, damages due for breach of contract, for detention or for torts, are included under the general head or title of things in action. (*n*) A chose in action has been again described as a "right to be asserted, or property reducible into possession, either by action at law or suit in equity," (*o*) and this definition has been approved of in a recent case. (*p*) The expression, therefore, chose in action, is used rather indefinitely, sometimes for the thing to be recovered by action,—*e. g.*, damages for a breach of contract or tort,—and sometimes for the right to recover such damages. For the purpose of the present rule, it may perhaps be best defined as a claim to be asserted by an action at law.

The rule, therefore, that a chose in action can not be assigned, means in effect that no one can transfer to another the right to bring an action for such a claim in the name of the transferee or assignee. This holds good whether the right to bring an action be only what may be called a possible right of action, such as A. has against X., the moment a contract is entered into by X. with

(*k*) 2 Steph., Com., 6th ed., 11–12.

(*m*) 2 Kent, Com., s. 351. See Leake, Contracts, 6, and Broom, Com., 2nd ed., 428, 429.

(*n*) 2 Kent, Com., s. 351.

(*o*) 1 Williams, Executors, 6th ed., 738.

(*p*) Fleet v. Perrins, L. R. 4, Q. B. 500, 505 (Ex. Ch.). See L. R. 3, Q. B. 536. In this case the nature of a chose in action is elaborately discussed.

him; or an actual right of action, such as A. has against X., when X. has broken a contract with A., or has done a wrong to A.

Hence, the rule may thus be stated: A. can not transfer or assign to B. the right to sue X., so as to enable B. to sue X., in B's name, either on a contract made with A., or for a tort done to A.

A. purchased of X. a Derby lottery ticket, on the understanding that the holder of a ticket bearing [68] the name of a winning horse should receive a prize in money. X. received 5s. for each ticket, and was to pay the prize. A. sold the ticket to B., and the horse named on it won. It was held, that B. could not sue X., for that though there may have been a valid assignment of A.'s interest, the rule against the assignment of a chose in action prevented the party interested in the ticket from suing. (*q*)

The assignee of an administration bond under 22 & 23 Car. II. c. 10, which was assigned to him by order of the judge of the Court of Probate, under 20 & 21 Vict. c. 77, was held unable to sue upon it; (*r*) and an interest in a partnership, being a chose in action, can not be assigned in law, so as to enable the assignee to sue as a partner. (*s*)

The rule that a chose in action can not be assigned, is less important than it might at first sight appear, because, though "by the strict rule of the ancient common law, no chose in action could be assigned or granted over, . . . this nicety is not now so regarded, as to render [an assignment] really ineffectual. It is, on the contrary, in substance, a valid and constant practice, although, in accordance with the ancient principle, the form of assigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And, therefore, where in common acceptation a debt or bond is said to be as-

(*q*) Jones v. Carter, 8 Q. B. 134; 15 L. J. 96, Q. B.

(*r*) Young v. Hughes, 26 L. J. 161, Ex.; 4 H. & N. 76. See now, 21 & 22 Vict. c. 95, s. 15.

(*s*) Tempest v. Kilner, 15 L. J. 10, C. P.; 2 C. B. 300.

signed over, it must still be sued in the original creditor's name, for the bringing of which suit the person to whom it is transferred has sufficient authority. But the king is an exception to this general rule, for he might always either grant or receive a chose in action by assignment; (*t*) and our courts of equity (*u*) . . . allow the assignment of a chose in action as freely and directly as the law does that of choses in possession." (*x*)

The result is, that a person with whom a bond, or other personal contract, is made, can assign his interest therein to a third party, and such an assignment is in many points of view recognized, not only in equity but at law. But the assignee can not sue on the contract in his own name, but must proceed in the name of the assignor, or if the assignor be dead, in the name of his personal representative; *i. e.*, of his executor or administrator. (*y*) Though in transferring a chose in action as a debt or bond it is often found convenient to assign it by a deed in legal form, with a power of attorney to sue in the name of the assignor, no particular words (*z*) or form of assignment seem to be necessary, and it is said that the assignee has a right to bring an action in the assignor's name, and that it is sufficient authority for the attorney to commence proceedings, if he has received instructions from the assignee. (*a*)

In consequence (mainly) of the rule that a chose in action can not be assigned, combined with the principle that the courts of law look only to the parties on the record, it constantly happens that an action is brought in the name of one person (the nominal plaintiff) who has no real interest in the result, for the benefit of another person (the real plaintiff) who is really interested.

This happens when one person stands in the position of trustee and another in that of cestue que trust, *e. g.*,

(*t*) Bretherton's Case, Dyer, 30*b*.
(*u*) Rowe v. Dawson, Tudor, L. C. in Eq., 2nd ed., 612, 651.
(*x*) 2 Steph., Com., 6th ed., 45, 46.
(*y*) Chitty, Pleading and Parties to Action, 7th ed., 17.
(*z*) 1 Tudor, L. C., 2nd ed., 653.
(*a*) Pickford v. Ewington, 4 D. P. C. 45.

where A. is the legal and B. the equitable owner of the land or where A. has assigned his interest in a debt or contract to B.), or where a manager, clerk, or other officer of a company is empowered by law to sue [70] on its behalf.

The plaintiff on the record (*i. e.*, the nominal plaintiff) is still in many respects the sole person whom the courts of law will regard. He is the person who will be compelled to pay costs, (*c*) for the real plaintiff not being a party to the record can not be brought before the court, and therefore can not be compelled to pay them.

"The authority of the courts at Westminster is derived from the Queen's writ, directing them to take cognizance of the parties mentioned in the writs respectively, and thus bringing the parties before them. This being so, they have no power to order any particular individual to come before them at their pleasure. . . . . However anxious, therefore, we might be to make this rule" [ordering payment of costs by the real plaintiff] "absolute, by doing so we should establish a precedent which would open a wide sea to injustice. The cases where the courts have interfered in this way are cases of exception. They are cases where application is made for security for costs, and even there the order is made in the cause, and the immediate thing commanded is a stay of proceedings, by which means the ulterior object of a security for costs is obtained. So in ejectment, which is a fictitious proceeding, the courts allow the action to be brought in the name of a nominal plaintiff, and allow the landlord to come in and defend, but they take notice of the real parties litigant. Those are the excepted cases, but the general rule is, that courts of justice have no power except over parties to the record." (*d*)

The assignor of a debt, who brings an action in his own name, can not be stayed in his proceedings on the

(*c*) Evans v. Rees, 2 Q. B. 334, 341. Except in actions of Ejectment. Ibid.

(*d*) Hayward v. Giffard, 4 M. & W. 196, 197, judgment of Lord ABINGER, C. B.

application of the defendant and the assignee, the right course apparently being to make application to [71] equity after judgment, to restrain the plaintiff from issuing execution, (*e*) and the courts have no power to compel a trustee to allow an action to be brought in his name.

But though the courts of law deal with the plaintiff, who is only nominally interested in the action as if it were brought on his behalf, they will, nevertheless, indirectly secure to a great extent justice to the three persons whose interests must be regarded, *sc.*, the real plaintiff, the nominal plaintiff, and the defendant.

1st. An action brought by a real plaintiff in the name of a nominal plaintiff, will not be set aside merely on the ground that the nominal plaintiff refuses his consent to the action, (*f*) though it would seem that the assent of the nominal plaintiff should be obtained before commencing the action, and that at least an application to him should be made, together with an offer of a sufficient indemnity against costs. (*g*)

2ndly. The courts will indirectly prevent the nominal plaintiff from doing that which he, like every other plaintiff, has a right to do, (*h*) *sc.*, giving a release from the action to the defendant.

The courts used to achieve this object in the case of a fraudulent release, by setting aside the plea of the defendant in which such release was pleaded. The same object is now more simply attained by allowing an equitable replication setting out the facts of the case. (*i*)

(*e*) Sepping v. Nokes, 2 C. B. 292, 294.

(*f*) Spicer v. Todd, 1 D. P. C. 306. Conf., Auster v. Holland, 3 D. & L. 740; Chambers v. Donaldson, 9 East, 471. Compare Coleman v. Biedman, 7 C. B. 871; nom. Coleman v. Beadman, 18 L. J. 263, C. P.

(*g*) Spicer v. Todd, 1 D. P. C. 307.

(*h*) Legh v. Legh, 1 B. & P. 447; 12 L. J. 275, Ex.; Phillips v. Claggett, 11 M. & W. 84; Manning v. Cox, 7 Moore, 617.

(*i*) De Pothonier v. De Mattos, 27 L, J., 260, Q. B.; E. B. & E. 467. This is, to a certain extent, an exception to the principle that a replication must not show a merely equitable right in the plaintiff.

It seems doubtful whether a release, which is not fraudulent, can in any way be got rid of (Crook v. Stephens, 5 B. N. C. 688). But a release by a merely nominal plaintiff almost always must be fraudulent.

Where a nominal plaintiff, being the officer of a society, discharged the defendant from execution, [72] he was attached for contempt of court. (*k*)

The courts will secure a nominal plaintiff against being forced to pay the costs of an action in which he has no interest, by staying the action until security for costs be given him: (*l*) and the real plaintiff should, before commencing an action, tender a sufficient indemnity for costs to the nominal plaintiff.

The court may call on the nominal plaintiff to give security for costs. (*m*)

"If a plaintiff in a cause be merely a nominal one, the defendant may call upon him, not the party behind, to give security for costs, and that will probably bring the real party forward." (*n*)

This can be done only where the nominal plaintiff is in insolvent circumstances. (*o*)

This rule, though applying to rights of action of all kinds, is for convenience considered separately in its relation to actions on contract and actions for torts respectively. The exceptions to it will be found under the rules as to actions on contract.

Rights of actions are also transferred or assigned in consequence of marriage, bankruptcy, and death; and the exceptions to the general rule which thus arise are considered in the chapters appropriated to these subjects.

RULE 7.—No person can be sued who has [73] not infringed upon the right in respect of which the action is brought.[1]

(*k*) McGregor v. Barrett, 6 C. B. 262.

(*l*) Auster v. Holland, 2 D. & L. 740. Spicer v. Todd, 1 D. P. C. 306.

(*m*) Evans v. Rees, 2 Q. B 334.

(*n*) Spicer v. Todd, 1 D. P. C. 306.

(*o*) Andrews v. Marris, 7 D. P. C. 712. See, as to actions brought without authority, Barker v. Rowe, 3 D. P. C. 496; Hubbart v. Phillips, 14 L. J. 103, Ex.; Hoskins v. Philips, 16 L. J. 339, Q. B.; Bayley v. Buckland, 1 Ex. 1; 16 L. J. 204, Ex.; Stanhope v. Fermin, 3 D. P. C. 701; Barber v. Wilkins, 5 D. P. C. 305.

[1] No person can be made a defendant in a cause except by

The object of the foregoing rules has been to determine the person by whom an action may be brought; or, in other words, to answer in the most general terms the

process of law, or by his own consent; and no one can be directly affected by the judgment of the court except those who are parties. Marshall v. Drayton, 2 Nott. & M. A specialty can not be sued in the name of the assignee. Read v. Young, 1 D. Chip. (Vt.) 244. Assessors signing a warrant to collect a wrongful tax are liable separately as well as jointly. Withington v. Eveleth, 7 Pick. 106. Where the owner of property in possession of a tenant of demised premises, buys it in on a sale thereof as a distress for rent, he may maintain an action for money paid against such tenant and his co-tenant, their joint property being benefitted by the payment of the rent. Wells v. Porter, 7 Wend. 119. An action on a written contract by A. to sell and deliver all the wool cut from the flock of himself and his sons is rightly brought against A alone, although the sons also signed the contract. Stearns v. Foote, 20 Pick. 432. An action against two trustees jointly, for money had and received to the use of the cestui que trust, can not be sustained unless a joint promise is shown, express or implied; and such promise will not be implied from the separate admission of each that he has funds in his hands equal to the amount of the plaintiff's claim. Deforest v. Jewett, 2 Hall, 130. In an action for injuries caused by a steamer, the petition was against the master (who was mentioned by name) and "owners," not mentioning the latter by name,—held, that the suit was against the master only. Kountz v. Brown, 16 B. Mon. 577. The fact that a party appears in and defends an action alone is not evidence that he is the party in interest. Carleton v. Patterson, 29 N. H. (9 Fost.) 580. The well-settled principle of the common law, that no one is to be condemned, in person or estate, without an opportunity of being heard, applies even to a statutory proceeding where the statute is silent on the subject of notice. State v. Newark, 25 N. J. L. (1 Dutch.) 399. A party is not precluded from recovery against one joint tort-feasor by showing that others have borne a share in it. North Penn. R. R. Co. v. Mahoney, 57 Pa. St. 187. Persons jointly taking fish, contrary to a statute, are liable jointly and severally in an action qui tam. Boutelle v. Nourse, 4 Mass. 431; Hill v. Davis, Id. 137; Burnham v. Webster, 5 Id. 266. Where several defendants are sued by process bailable, the plaintiff can not declare separ-

question who may be the plaintiff in an action. The object of this and of the two following rules is to determine the person against whom an action may be brought, or, in other words, to answer in the most general terms the question who may be made defendant in an action.

A reply to the first question involves the answer to the second; for when it is laid down that no one can sue except for the infringement of a common law right, and

ately against one; otherwise, as to process not bailable. Bell v. Carroll, 1 Cow. 193. In equity no persons are parties defendants to a bill in chancery except such as are described and named as such, and against whom a subpœna is prayed. Carey v. Hillhouse, 5 Ga. 251; Verplanck v. Mercantile Ins. Co., 2 Paige, 438; Talmage v. Pell, 9 Id. 410; Lucas v. Bank of Darien, 2 Stew. 280; Green v. McKenny, 6 J. J. Marsh, 193; Archibald v. Means, 5 Ired. Eq. 230. But merely naming persons as defendants, and issuing process, does not make them so; there must be service of process, either actual or constructive. Estill v. Clay, 2 A. K. Marsh, 497. One who is neither a party or privy to a proceeding in equity is not bound by it. Lang v. Waring, 17 Ala. 145. A person interested in the subject-matter of a suit in equity, and refusing to join with the complainant, may be made a defendant, though his interest is with the complainant. Smith v. Sackett, 10 Ill. (5 Gilm.) 534; Contee v. Dawson, 2 Bland, 264. But publication against persons not made defendants to the bill does not make them parties to the suit. Letcher v. Schroeder, 5 J. J. Marsh, 513; Taylor v. Bate, 4 T. B. Mon. (Ky.) 267. A court of equity will not afford relief for an injury sustained by the fraud of a person who is no party to a contract induced by that fraud. Russell v. Clark, 7 Cranch, 69 The rule that a state can not be sued in her own courts applies only where the state is a party to the record, and not where she is only interested in the subject-matter of a suit brought against her officers in their official capacity in a court of chancery. Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225. Where persons not within the jurisdiction are named as parties in a bill in equity, the court may, before a hearing on the merits, require satisfactory evidence that such parties have actual knowledge of the pendency of the bill against them, so that they can, if they see fit, appear and answer. Lawrence v. Rokes, 53 Me. 110.

that every person can sue who has suffered an infringement of a common law right, it follows that no one can be sued who has not infringed upon a common law right of another's, and that any person can be sued who has infringed upon such a right. Still, though the general rules as to plaintiffs involve in themselves to a great extent the general rules as to defendants, confusion is avoided by considering the latter rules separately.

X. is not liable to be sued by A. unless he has infringed upon some right of A.'s. As A.'s rights either depend upon a contract between him and X., or exist independently of any contract between him and X., X., if he has violated A.'s rights, must have broken a contract, or have infringed upon a right independent of contract, that is, have committed a wrong.

The general rule in its application to actions for breach of contract hardly admits of any explanation clearer than the statement of it. It amounts, in fact,
[74] to this: that X. can not be sued by A. for the breach of any contract to which X. is a stranger; (*q*) or, in other words, that X. can not be sued for breaking a contract which X. has not made. Confusion, nevertheless, has occasionally arisen from a neglect of this principle.

X., for example, professes to be acting as an agent for Y., and to have power to contract on Y.'s behalf with A. As a matter of fact, X. has no authority to enter into an agreement with A. on behalf of Y., and A., therefore, after having been induced by X. to contract, finds it impossible to enforce the contract against Y. (*r*)

It was at one time thought (*s*) that A., under these circumstances, could sue X. for the breach of the contract which X. alleged he had authority to make between A.

(*q*) There is an apparent exception to this principle in those cases in which an agent can be sued for a contract made by his principal; but they really illustrate the rule, for in each of these cases, it will be found that the agent is liable, because he makes himself a party to the contract. See Chapter XII.

(*r*) Chapter XII.

(*s*) See Chandelor v. Lopus, 1 Smith, L. C., 6th ed., 170; Thompson v. Davenport, 2 Smith. L. C., 6th ed., 327.

and Y. It is now settled that on that contract A. can not sue X. "I always thought," it has been said by Lord CAMPBELL, C. J., "that the notion of suing an agent in such a case as principal was absurd. For instance, in the case of a man promising that another shall marry a woman, and it turning out that he had not authority to make the promise—could he be sued for breach of promise of marriage? But it is clear that an agent gives a warranty that he is agent when he signs as agent, and he is liable to make a recompense to the party to whom he represents himself as agent for the damage which he has caused by the breach of the warranty." (*t*) He may sue X., if there has been fraud, for fraudulently rep- [75] resenting that he had authority to contract for Y., for this is a distinct wrong done to him by X. independently of the contract. He may also sue X. for an implied warranty, *i. e.*, on a contract arising from the whole circumstances of the transaction between him and X., that X. had authority from Y. to contract for him. (*u*)

There is more difficulty in the application of the rule to actions for torts, since X. may, by his conduct, occasion damage to A., and yet it may be hard to decide whether X. has or has not infringed upon A.'s rights. This difficulty is specially apt to arise in cases in which it is essential for A., in order to maintain his action against X., to show that actual damage has resulted to him from the acts of X. X.'s liability depends upon his being "the cause" of the wrong, but he is not in law considered the cause unless the damage can be naturally and clearly connected with his acts or omissions; (*x*) and it may be difficult to show that the damage to A. is the natural result of X.'s conduct, and, again, though X.'s negligence may

(*t*) Collen v. Wright, 26 L. J. 150, Q. B., per CAMPBELL, C. J. Compare as to liability of auctioneers, Warlow v. Harrison, 28 L. J. 18, Q. B.; 29 L. J. 14, Q. B. (Ex. Ch.); Benjamin, Sale, 353–357.

(*u*) Se Collen v. Wright, 7 E. & B. 301; 26 L. J. 147, Q. B.; 27 L. J. 215, Q. B.; Randall v. Trimmen, 18 C. B. 786; 25 L. J. 307, C. P.; Simons v. Patchett, 7 E. & B. 568; 26 L. J. 195, Q. B. See further on this point, Chapter XII.

(*x*) See Chapter XXV.

indubitably occasion damage to A., still, if A.'s own negligence contribute to the result, X.'s negligence is not considered the cause of the damage, and he is not liable on account of what is termed the contributory negligence of A. (*y*)

[76] RULE 8.—Every person can be sued who infringes upon the right of another.[1]

This rule is in its application to breaches of contract perfectly simple. Any person who makes a contract infringes upon the right of another by even the slightest omission to perform that which he has contracted for. If, therefore, X. contracts with A., X. can be sued by A. for every breach of the contract, and all that need be established in order to make X. liable is that he has made the contract with A., and that he has broken it. (*z*)

Similarly, if X. causes an "injury" to A., or, in other words, invades any right of A.'s which exists independently of contract, X. is liable to an action by A. If the act complained of is one actionable in itself, *e. g.*, an assault, the publication of a libel, &c., all that is necessary in order to make X. liable is to show that the act complained of was the act of X.

If, on the other hand, X.'s act is one the wrongfulness of which depends upon the actual damage caused by it to A., (*a*) *e. g.*, where X. uses defamatory language about A., actionable only by reason of the resulting damage, then it is necessary to show, in order to make X. liable, first, the utterance of the slander by him, and secondly, the damage resulting to A.

RULE 9.—The liability to be sued can not be transferred or assigned.

(*y*) Ibid.
(*z*) Chapter XXV.
(*a*) See *ante*.

[1] See last note.

If X. be under a contract with A., or if X. has committed a tort against A., he can not transfer or assign to Y. his liability to be sued for breach of the [77] contract, or for the tort by A.

The exceptions to this rule are: the assignment of liabilities on covenants which "run with the land," the assignment of liability for a debt by agreement among all the parties interested, and the assignment of liabilities in consequence of marriage, bankrupty, or death. (*c*)

(*c*) See Chapter XI.

CHAPTER IV.

ACTIONS ON CONTRACT.

PLAINTIFFS.—GENERAL RULES.

RULE 10.—No one can sue for the breach of a contract who is not a party to the contract. (*a*)[1]

This rule is often expressed in the maxim that no one can sue on a contract "who is a stranger to the contract,"

(*a*) This rule applies in strictness only to the original parties to the contract. To make it complete should be added the words, "or who does not derive rights from an original party to the contract." This addition is needed in order to include the case of executors and others who sue as representing original parties to a contract. The same remark applies to Rules 11 and 12.

[1] See the case of Boston v. Schaffer, 9 Pick. 415, where an action on a promise to the mayor and aldermen of a city to pay for a theatrical license was held rightly brought in the name of the city. Where, upon the completion of a contract for hauling bark, the balance due the contractor was at his request placed to the credit of a third person,—held, that the latter could not maintain an action in his own name for the amount credited, he being a stranger to the contract and consideration. Robertson v. Reed, 47 Pa. St. 115. The purchaser, from an assignee in insolvency, of a promissory note payable to the insolvent or his order, and not indorsed either by the insolvent or the assignee, may maintain an action thereon, in the name of the insolvent, against the maker, if the insolvent interposes no objection. Stone v. Hubbard, 7 Cush. 595. But the purchaser of a chose in action from the assignee of the estate of an insolvent debtor can not maintain an action thereon in his own name without an express promise by the debtor to pay such purchaser. Hay v. Green, 12 Id. 282. And if an instrument is not under seal, the party for whose benefit it is made may sue thereon in his name, though the engagement is

or "who is not privy to it." In whatever words expressed it embodies the principle that "rights founded on contract belong to the person who has stipulated for them,"(*b*) and to no other, and, therefore, that no one can sue for the non-performance of an agreement to which he was not either directly or through his agent a party. (*c*)

The reason why A. can sue X. for a breach of contract is, that A. has, in virtue of X.'s promise to him, acquired certain rights against X., which X. infringes upon by breaking his agreement. But as these rights depend upon the promise made by X. to A., they can not be the rights of any third party, M., to whom A. has not made a promise, *i. e.*, who is not a party to the contract. The breach, therefore, of the contract, even though it may damage M., does not interfere with M.'s rights, [79] and therefore gives M. no right of action. (*c*)

To look at the same thing from another point of view: X., the contractor, incurs a "duty" towards A., the other party to the agreement, to perform his contract, but he comes under no obligation in respect of the agreement towards any third person, M. If, therefore, X. breaks his promise, he is liable to an action by A., but is not liable to be sued by M. It is, in short, "clear that an action of contract can not be maintained by a person

(*b*) Alton v. Midland Rail. Co., 19 C. B., N. S., 240.
(*c*) Ibid.
(*e*) Rule 2.

not directly to or with him. Brice v. King, 1 Head. (Tenn.) 152. In an action upon a contract made between two married women, the husbands' names only must be used, unless the contract be ante-nuptial. Williams v. Coward, 2 Phil. (Pa.) 70. The question as to who may bring a suit in equity is more difficult of solution, it has been said, for instance, that if a person have religious scruples against being a party in a suit, he may sue by his prochein ami. Malin v. Malin, 2 Johns. (N. Y.) Ch. 238; but see Varney v. Bartlett, 5 Wis. 270; Oakey v. Bend, 3 Edw. 482. It is the general rule that a party beneficially interested in a contract, although not a party to the instrument, may maintain a suit in equity in his own name to enforce his rights. Burlew v. Hillman, 16 N. J. Eq. 23.

who is not a party to the contract; and the same principle extends to an action of tort arising out of a contract." (*f*)

No one, therefore, can bring an action for a breach of contract merely because he thereby suffers loss or damage, since a person may be damaged by the breach of a contract to which he is not a party, and under which, therefore, he has no rights. The loss he suffers, in so far, of course, as it arises merely from the breach of the contract, is damnum absque injuria, and affords no cause of action. (*g*)

X., for example, contracts with A. to pay M. £20. If the money is not paid, M., though interested in the performance of the agreement, can not sue X.; (*h*) the action must be brought by A.

X. enters into a contract with A., and his non-performance of it indirectly injures M.; M. can not, and A. can, sue X. (*i*)

Contracts are divided into "simple" (or "parol") contracts, *i. e.*, agreements (whether by word of mouth or in writing) which are not under seal, and specialties *i. e.*, contracts either under seal (or by deed), or of
[80] record. If contracts of record, to which it is not necessary to do more than refer, be omitted, agreements may be divided into contracts not under seal, *i. e.*, simple contracts, and contracts under seal, *i. e.*, deeds. (*k*)

As no one can sue on a contract who is not a party to it, and it is obvious that the person with whom a contract is made can sue upon it, the point to be ascertained in determining who ought to be the plaintiff in an action for

(*f*) Tollit v. Shenstone, 5 M. & W. 289; 8 L. J. 244, Ex., judgment of MAULE, B. Winterbottom v. Wright, 10 M. & W. 116; 11 L. J. 415, Ex.

(*g*) See *ante*.

(*h*) Crowe v. Rogers, 1 Str. 592; Price v. Easton, 4 B. & Ad. 433.

(*i*) Winterbottom v. Wright, 10 M. & W. 116; 11 L. J. 415, Ex.; Alton v. Midland Rail Co., 19 C. B., N. S., 219; 34 L. J. 292, C. P.

(*k*) Rann v. Hughes, 7 T. R. 251. "All contracts are, by the laws of England, distinguished into agreements by specialty and agreements by parol." Conf. Von Mierop v. Hopkins, 3 Burr. 1663.

breach of contract is, who is the person with whom the contract is, in point of law, considered to be made.

Rule 11 determines who is the person who must sue for the breach of a simple contract, *i. e.*, who is the person with whom such a contract must be considered to be made.

Rule 12 determines who is the person who must sue for the breach of a contract by deed, *i. e.*, who is the person with whom such a contract must be considered to be made.

Torts founded on contract.—Attempts have often been made to evade the rule that no one can sue on a contract who is not a party to it, by bringing what is in reality an action for breach of contract in the form of an action for tort. These attempts have always failed whenever the action was considered by the Court to be in substance grounded on contract. (*l*)

RULE 11.—The person to sue for the [81] breach of a simple contract must be the person from whom the consideration for the promise moves. (*m*)

A mere promise by one person to another does not (unless made by deed) constitute a contract. If X., either by word of mouth or in writing, *e. g.*, by letter, promise A. to pay him £100, this does not constitute a contract between A. and X.; and if X. does not keep his promise A. has no remedy against him.

To constitute a valid simple (or parol) contract, *i. e.*, an agreement not under seal, three things are necessary: "a promisor," or "person who promises," "a promisee," or "person to whom a promise is made," and lastly, "a consideration," or "inducement to the promisor to

(*l*) See further, as to such actions, Chapter XIX. The exceptions to Rule 10 are also exceptions to Rule 11, and are considered in that light. See *post.*

(*m*) Smart v. Chell, 7 Dowl. 785.

make the promise." Thus, if X. buys goods from A., and promises to pay him £20 for them, there are all the requisites for a binding contract. X. is the "promisor," A. is the "promisee," the supply of the goods by A. to X. is the "consideration or inducement for X's promise." The promise need not be made in so many words, but may be what is called implied; (*n*) and is binding, though not made to a definite person, if it be made to him as the member of a class. X., for example, offers a reward to any person who will find a watch which he has lost.
[82] The promise is as much a promise made to A., the finder, as if it had been a promise made directly by X. to A. to pay him a reward if he found X's watch. (*o*)

The consideration or inducement may be described as "some matter agreed upon as a return or equivalent for the promise made, showing that the promise is not made gratuitously." (*p*) "A consideration is any act of the plaintiff [the promisee] from which the defendant [the promisor] derives or expects to derive any advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, if such act is performed or such inconvenience suffered by the plaintiff at the request or with the consent, either express or implied, of the defendant." (*q*) The consideration may therefore be defined in very general terms as any inducement offered by one party to another to induce the other to contract with him. (*r*)

(*n*) A promise is called implied in at least three cases,—1. Where there is a contract between two parties, the terms of which are distinctly understood but not expressed in so many words; 2, where there is a contract between two parties, some of the terms of which are not fixed by themselves, but are affixed by the law to the relation in which they stand; as where X. undertakes to carry the goods of A., and thereby incurs the liabilities of a carrier; 3, where no contract exists, but one party is considered by the law to have the same rights against another which he would have were there a contract between them; as where A. is compelled to pay money which X. is legally bound to pay, and the law implies a promise on X.'s part to repay it.

(*o*) Williams v. Carwardine, 4 B. & Ad. 621.

(*p*) Leake, Contracts, 10.

(*q*) 1 Selwyn, N. P., 13th ed., 55.

(*r*) Looked at from the side of the promisee, the consideration might be more accurately described as any act, &c., which one person is induced by another to perform in return for that other's promise. It must be remembered

To make the contract valid, not only must there be a consideration or inducement, but the consideration must proceed from the promisee, or, more strictly, the law considers the promise to be made to the person from whom the inducement to make it comes; or, in other words, "from whom the consideration moves."

As the person to sue for the breach of an agreement must be the person with whom the agreement is made, or, in other words, to whom the defendant has made a promise, it follows that the person to sue for the breach of a simple contract must be the person "from whom the consideration moves," since, as already explained, he is the person to whom the law considers the [83] promise to have been made. He need not, however, necessarily be the person to receive benefit from the performance, or to suffer from the breach of the agreement.

A., for example, stipulates with X. that, in consideration of a payment made, or other service rendered by A. to X., X. shall build a house for M. X. breaks his contract. The person to sue X. is not M., who suffers by the house not being built, but A., since the consideration moved not from M., but from A.

Any difficulty in understanding this rule arises either from forgetfulness of the fact that a mere promise by word of mouth or in writing (if not under seal) does not constitute a contract, or from the failure to observe that, though ordinarily the person from whom the consideration moves is also the person who will derive benefit from the performance of the contract, yet it may equally well happen that the consideration moves from one person, and that another person be benefitted by the performance, or lose by the breach of the contract. That this is so is most easily seen from examples.

A., the plaintiff, had a claim against M. for a debt of £70. X., the defendant, undertook, in consideration of

that in many cases the contract does not begin by an offer on the part of the promisee, but by a promise on the part of the promisor of some advantage, *e.g.*, payment, if the promisee perform some act.

M. making a title for X., to pay A. the £70. A. was held to have no right of action against X., since the consideration moved from M., and not from A. (*s*)

In consideration that M. would work for X. (the defendant), X. undertook to pay a certain sum to A. (the plaintiff). The declaration in this case did not "show any consideration moving from the plaintiff to the defendant." (*t*) Hence, the plaintiff was held to have no cause of action. As there was no privity shown between the plaintiff and the defendant, the case was held precisely like Crowe v. Rogers, and was governed by it. (*u*)

[84] After a marriage between A. (the plaintiff) and M.'s daughter, N., the father of A., and M. agreed, with a view to provide a marriage portion, to pay two sums of money to A.; and, further, that A. should have power to sue for the same in any court of law or of equity. It was held, nevertheless, that A. could not bring an action against X., the executor of M., for that no consideration moved from A. (*x*)

Had the agreement been made before the marriage (A. being a party thereto), there would have been a good consideration moving from A., *i. e.*, the subsequent marriage with the daughter of M. (*y*)

This case disposes of early decisions from which it might appear that a person not a party to the contract could sue on the ground of his interest in the contract, combined with his near relationship to a party to the contract.

"Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it if he stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration. The strongest of those cases is that cited in

(*s*) Crowe v. Rogers, 1 Str. 592.

(*t*) Price v. Easton, 4 B. & Ad. 434, judgment of DENMAN, C. J.

(*u*) Ibid., judgment of LITTLEDALE, J.

(*x*) Tweddle v. Atkinson, 1 B. & S. 393; 30 L. J. 265, Q. B.

(*y*) Shadwell v. Shadwell, 9 C. B., N. S., 159; 30 L. J. 145, C. P. (Ex. Ch.).

Bourne v. Mason, (*z*) in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit. (*a*) At the time when the cases . . . . cited were decided, the action of assumpsit was treated as an action of trespass upon the case, and, therefore, in the nature of a tort; (*b*) and the [85] law was not settled as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained, nor was it settled that the promisee can not bring an action unless the consideration moved from him. The modern cases have in effect overruled the old decisions. They show that the consideration must move from the party entitled to sue upon the contract." (*c*)

A. became the purchaser and bearer of shares in a company of which X. (the defendant) was managing director. A. was induced to become such purchaser and bearer, through confidence in the promise by X. of certain advantages to all bearers of shares in the company, and sued X. for the non-performance of this promise. It was held, that A. could not sue X. for breach of contract, for that there was no consideration for the promise. (*d*)

"There seems to us," it is said in the judgment in this case, "as between these parties to be an entire want of consideration for the promise. It is not stated, nor does it appear, that from the plaintiff's buying and becoming bearer of these shares, any benefit accrued to the defendant, or that at the time when the contract is supposed to

(*z*) 1 Ventr. 6.

(*a*) Tweddle v. Atkinson, 1 B. & S. 397; 30 L. J. 267, Q. B., judgment of WIGHTMAN, J.

(*b*) See *ante*.

(*c*) Tweddle v. Atkinson, 1 B. & S. 398; 30 L. J. 267, Q. B., judgment of CROMPTON, J.

(*d*) Gerhard v. Bates, 2 E. & B. 476; 22 L. J. 364, Q. B.

have been entered into, any prejudice accrued to the plaintiff. A prejudice to the promisee incurred at the request of the promisor, may be a consideration as well as a benefit to the promisor proceeding from the promisee. But this must be a prejudice on entering into the contract, not a prejudice from the breach of it." (*e*)

This case should, however, be distinguished from the cases in which it has been held that an action may [86] be maintained for a reward offered in a public advertisement. They are somewhat peculiar, "but in these cases there is a distinct promise to any one who shall make the discovery, and there is a good consideration for the promise in the benefit to accrue to the promisor, as in showing that he is heir-at-law to a person who died seized of real property and intestate, or prejudice to the promisee, as that he shall entitle himself to the reward by voluntarily coming forward as a witness." (*f*)

It has been held that the receiver of a telegraphic message could not maintain an action against the company for a mistake in transmitting the message, whereby he has been damnified. (*g*) This decision rested on the ground that the obligation of the company to use due care and skill in the transmission of the message was one entirely arising out of the contract, and that the contract was made with the sender of the message. This case exactly illustrates the general rule. The person damaged, *i. e.*, the receiver of the message, was not the person with whom the contract was made. The sender, with whom the contract was made, was not damaged. The latter, nevertheless, was the person by whom the action ought to have been brought. (*h*)

A., the consignor or sender, delivers goods to X., a

(*e*) Ibid., 487, 488; per CURIAM.

(*f*) Gerhard v. Bates, 2 E. & B. 488; judgment of CAMPBELL, C. J. See Williams v. Carwardine, 4 B. & Ad. 621; Tarner v. Walker, L. R. 2, Q. B. 301; 36 L. J. 112, Q. B. (Ex. Ch.); L. R. 1, Q. B. 641; 35 L. J 179, Q. B.

(*g*) Playford v. United Kingdom Telegraph Co., L. R. 4, Q. B. 706. This case was decided before the telegraphs were transferred to the Post-office. As to difficulty in bringing actions against the Post-office, see Chapter XXVI.

(*h*) See for further illustrations of rule, Pigott v. Thompson, 3 B. & P. 147; M'Contray v. Thomson, Irish Rep., 1 Com. Law, 226.

carrier, to be carried to B., the consignee, or person to whom the goods are sent. The goods are not delivered. Is A., the consignor, or B., the consignee, the person to sue X.?

The general answer is that the contract for carriage is sometimes to be considered an agreement between the consignor A. and the carrier X., and sometimes [87] to be considered an agreement between the consignee B. and the carrier X., but that most usually it will be found to be an agreement between the consignee and the carrier, and that therefore B., and not A., is usually the right person to sue.

In determining whether the consignor or the consignee of the goods is the proper plaintiff, the following principles must be borne in mind:

1stly. The contract for carriage is, in the absence of any express agreement, presumed to be between the carrier and the person at whose risk the goods are carried, *i. e.*, the person whose goods they are and who would suffer if the goods were lost.

This person is ordinarily the consignee, for when, as is often the case, he is the purchaser of the goods, delivery of the goods by the vendor to the carrier operates as delivery to the purchaser or the consignee. (*i*) It is for him the goods are carried, and the consignor, in employing the carrier, is considered as agent of the consignee for that purpose; since it appears "to be a proposition as well settled as any in law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods, and if any accident happens to the goods, it is at his risk." (*k*)

(*i*) 1 Selwyn, N. P., 13th ed., 359.

(*k*) Dutton v. Solomonson, 3 B. & P. 584, judgment of ALVANLEY, C. J.; Dawes v. Peck, 8 T. R. 330; 3 Esp. 12. See Wait v. Baker, 2, Ex. 1; 17 L. J. 307, Ex.

When, therefore, goods are sent to a person who has purchased them; or are shipped under a bill of lading by a person's order, and on his account, (*l*) the consignee, as being the person at whose risk the goods are, is [88] considered the person with whom the contract is made. He is liable to pay for the carriage, (*m*) and is the proper person to sue the carrier for a breach of contract.

2ndly. Since the reason of the consignee being the person to sue is, that the goods are his and at his risk, and therefore the agreement for carriage is (in the absence of any special contract) held to be made with him, it follows that if the goods are not at the risk of the consignee the consignor is the proper person to sue.

Where, that is to say, from any cause the property in the goods has not passed to the consignee, and they remain at the risk of the consignor (as where goods are forwarded for sale on approval, (*n*) or where the contract of sale is within the Statute of Frauds, and there is no evidence of a contract or of a delivery and acceptance sufficient to satisfy the statute, (*o*)) then the contract is considered to be with the consignor, and he, therefore, is the person to sue for its breach.

"If goods," it has been said, "are delivered to a carrier to be forwarded to their place of destination, that may or may not be a contract with the consignee. In the case of vendor or vendee, the consignor does not

(*l*) Brown v. Hodgson, 2 Camp. 36.

(*m*) Dommett v. Beckford, 5 B. & Ad. 522; 1 Selwyn, N. P., 13th ed., 361. It is said that the mode in which the carrier was to be paid, *sc.*, by the consignor, makes no difference; for this, King v. Meredith, 2 Camp. 639, is cited. This, however, is not the case of an action against the carrier. It does not (it is submitted) prove more than that the goods might be at the consignee's risk, even though the consignor were to pay for the carriage. It does not establish that the consignor might not, on account of the payment, have had a right of action against the carrier for non-delivery, *i. e.*, that the payment might not be considered proof of a special contract between the consignor and the carrier. Compare Davis v. James, 5 Burr. 2680.

(*n*) Swain v. Shepherd, 1 M. & Rob. 223; Sargent v. Morris, 3 B. & Ald. 277.

(*o*) Coates v. Chaplin, 3 Q. B. 483. Compare Freeman v. Birch, 3 Q. B. 492 Fragano v. Long, 4 B. & C. 219. Chitty, Contracts, 7th ed., 450.

act as the agent of the consignee, but on his own behalf, and up to the moment of the delivery of the goods to the carrier the property is in him. Upon the delivery the goods become the property of the ven- [89] dee. . . . Therefore if the goods are damaged or lost before the carrier pays the consignor," [*sc.*, the value of the goods] "he should ascertain whether the property is in him;" [*i. e.*, the consignor] "otherwise he would pay in his own wrong, if it should turn out that the property was in the vendee, for in that case the contract is with him alone. . . . I take this ground, that unless it can be shown that" [the consignor] "was the owner of the goods, the contract was with" [the consignee] "alone; therefore he alone is entitled to sue." (*p*)

3rdly. Though, if there be no express agreement, the person at whose risk the goods are (generally, though not always, the consignee) is the proper person to sue the carrier for non-delivery, yet, if there be an express agreement between the consignor and the carrier, *e. g.*, if the consignor expressly make himself liable to pay for the carriage, then the consignor may maintain an action against the carrier for non-delivery. And the case is substantially the same where the carrier has so dealt with the consignor as to be estopped from denying that the goods delivered to him are the consignor's goods. (*r*)

The law, therefore, on this subject may thus be summed up:

Where there is no express agreement, the person at whose risk goods are carried is entitled to sue the carrier for their non-delivery. This person is generally the consignee, but may be the consignor.

The action may be brought in the name of the consignor if there is an express agreement between him and the carrier as to the employment of the carrier on his account. (*t*)

(*p*) Per WATSON, B., Coombs v. Bristol and Exeter Rail. Co., 3 H. & N. 6.

(*r*) Compare Lush, Practice, 3rd ed., 10, 11.

(*t*) Davis v. Jones, 5 Burr. 2680; Moore v. Wilson, 1 T. R. 659; Sargent v. Morris, 3 B. & Ald. 277; Dunlop v. Lambert, 6 Cl. & Fin. 600; Bullen, Pleadings, 3rd ed., 122.

[90] Actions by consignor or consignee furnish no exception to the general rule; for where no express agreement exists the contract for carriage is a contract between the carrier and the person at whose risk the goods are carried, who, therefore, must sue for any breach of contract. When, again, there exists an express agreement with the consignor, he, as being the person with whom the contract is made, must be the plaintiff in an action against the carrier. (*u*)

The owner of the goods may sometimes, independently of any contract with the carrier, have a right to bring an action of tort against the latter for injury or damage done to his goods. (*x*) Hence (it is conceived) cases may arise in which the consignor may sue for the breach of an express contract, and the consignee, as owner, may also have a right to sue for damage to his property. (*y*)

Exception 1—Actions by a person appointed by statute to sue on behalf of others.

Banking companies within 7 Geo. 4, c. 46, s. 4, as well as other bodies, are empowered, and therefore compelled by statute, to sue in the name of one of their officers, *e. g.*, secretary, manager, clerk, &c. Such a nominal plaintiff brings actions on contracts to which he is not (unless he happens to be a shareholder in the company) in any sense a party. (*z*)

Exception 2.—Actions which can be brought either by a principal or an agent.

In certain cases (*a*) either the principal, with whom the contract is really made, or the agent through whom

(*u*) Where the consignor acts as agent of the consignee, but contracts in his own name, it would appear that either the consignor or the consignee may sue. Rule 17, Exceptions 4 and 5.

(*x*) Marshall v. York and Newcastle Rail. Co., 11 C. B. 665; 21 L. J. 34, C. P.; Martin v. Great Indian Rail. Co., L. R. 3, Ex. 9; 37 L. J. 27, Ex.

(*y*) Ibid. As to actions for torts founded on contract, see Chap. XIX.

(*z*) Rule 20, Exception 1.

(*a*) Rule 17, Exceptions 4–7.

a contract is made, can sue for its breach ; *i. e.*, a person can sue from whom the consideration does not move. [91]

Exception 3.—Some actions for money had and received.

The action for money received lies wherever the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff. (*b*)

The reason why the receipt of the money is a receipt by the defendant for the use of the plaintiff, may be the existence of circumstances altogether independent of a contract between the parties, or it may be the existence of an agreement of some sort on the part of the defendant to hold certain money for the use of the plaintiff. In the first case, the rule that a consideration must move from the plaintiff is inapplicable, since no contract exists. In the second case, the rule is hard to apply, since there is often a difficulty, even though a contract exists, in fixing upon any real consideration in the ordinary sense of that term.

"It is not a rule of universal application, that it is necessary to show privity in order to maintain an action for money had and received. There are many cases in which the action will lie, although there is no privity of contract. For instance, where money has got into the hands of a party by means of some tortious act, this action will lie at the instance of the real owner of the money." (*c*) Where the plaintiff's goods are taken and sold by the defendant, (*d*) where money has been obtained from the plaintiff by fraud, (*e*) by duress of his person or

(*b*) Moses v. Macfarlane, 2 Burr. 1000, 1110 ; see *ante* ; Bullen, Pleadings, 3rd ed., 44.

(*c*) Collins v. Brook, 5 H. & N. 706, judgment of CROMPTON, J.

(*d*) Lithgoe v. Vernon, 5 H. & N. 180 ; 29 L. J. 164, Ex. ; Hambley v. Trott, 1 Cowp. 371.

(*e*) Holt v. Ely, 1 E. & B. 795 ; Andrews v. Hawley, 26 L. J. 323, Ex.

property, by oppression, or by fraudulent use of
[92] legal process, (*f*) in consideration of doing that which the person obtaining it was legally bound to do without payment, (*g*) and generally wherever the defendant has committed a tort which resulted in his obtaining money from the plaintiff, an action lies for money received. (*h*)

So, where no tort has been committed, *e. g.*, where money is paid by one person to another under a mistake of fact, (*i*) (as when one person gives another change for a bank-note, both parties believing it to be genuine, and it turns out to be forged, (*k*)) or money has been paid for a consideration which has utterly failed, (*l*) and in other instances of the same sort, the action for money had and received often lies.

In these and similar cases it is clear that the basis of the action is in no sense the existence of a contract, that the existence, therefore, of "privity" between the plaintiff and defendant is not necessary, (*m*) and that the ordinary rules as to the person to sue for a breach of contract do not apply.

The ultimate ground on which the plaintiff rests his claim in the action for money received is that the defendant holds money of the plaintiff's which justice requires that the defendant should pay over to him. But though the reason why justice requires that the money should be paid to the plaintiff may be the existence of facts which have no connection with a contract, the reason more generally is that the defendant has received money
[93] which he has expressly or impliedly (*n*) (*i. e.*, by his acts) undertaken to hold for the plaintiff and pay

(*f*) Medina v. Groves, 10 Q. B. 152 ; Cadaval v. Collins, 4 A. & E. 858.

(*g*) Parker v. Great Western Rail. Co., 7 M. & G. 253.

(*h*) See further, for examples, Leake, Contracts, 52–57 ; Marriott v. Hampton, 2 Smith, L. C., 6th ed., 376, notes.

(*i*) Kelly v. Solari, 9 M. & W. 54.

(*k*) Woodland v. Fear, 26 L. J. 204, Q. B. ; 7 E. & B. 522, judgment of CAMPBELL, C. J.

(*l*) Ibid. See Leake, Contracts, 61, 62.

(*m*) Collins v. Brook, 5 H. & E. 708, judgment of BYLES, J.

(*n*) Williams v. Everett, 14 East, 582.

over to him. Hence it is often true that "in order to maintain this action, there must be a privity (*o*) between the plaintiff and the defendant." (*p*)

The cases which, though depending upon the existence of a contract, present some peculiarity, are those in which B. pays money to X. under directions to pay it over to A.

The question then arises (supposing X. not to pay over the money), is the action against him to be brought by A. or by B.? To this the answer is, that X. is liable to A., if he has expressly or by his acts undertaken with A. to hold the money as the money of A., and must in that case be sued by A. If he has not so undertaken, he is liable not to A., but to B., and must be sued by B.

"If a debtor by an order given to his agent appropriates a fund in his hands to the discharge of the debt, and the agent pledges himself to the creditor so to appropriate the fund, the order is irrevocable, and the creditor may sue such agent. . . . . But the creditor can not sue the agent unless the latter has assented to the appropriation so as to pledge himself to the creditor; for otherwise the debtor may countermand the order, and there is no privity between the creditor and the agent." (*q*)

"It does not appear," it has been said, in a case answering to that supposed, "that [B.] might not have countermanded the payment to the plaintiff [A.] at any time before he actually received the money. Nor is it shown that the plaintiff has been induced to do any act on the faith of receiving payment from the defendant. If it had been proved that the defendant [X.] had, as it were, attorned to the plaintiff, and agreed to hold [94] the money for his use, and not subject to the direction of [B.], the case would have been different." (*s*)

(*o*) 1 Selwyn, N. P., 13th ed., 119.

(*p*) Lilly v. Hays, 5 A. & E. 548; Noble v. National Discount Co., 29 L. J. 210, Ex.; 5 H. & N. 225; Liversidge v. Broadbent, 4 H. & N. 603; 28 L. J. 332, Ex.

(*q*) Forth v. Stanton, 1 Wms. Saund. 210*b*, note (*a*). Compare Collins v. Brook, 5 H. & N. 705, judgment of WILLIAMS, J.

(*s*) Howell v. Batt, 5 B. & Ad. 506, judgment of PARKE, J.

The general principle therefore is, that where B. pays money to X. for A., X. can not be sued by A. until there has been some undertaking on his part, either by word or act, to hold the money as the money of A., and that as long as B. can withdraw the order to pay to A. (*i. e.*, as long as the money continues B.'s), X. can not be sued by A., but must be sued, if at all, by B.

It is difficult to apply to this case the rule that the person to sue must be the person from whom the consideration moves; for, though it is clear that X.'s undertaking or promise to hold for A. is the ground of his liability to A. (when he is so liable), it is not equally clear what is the consideration from A.'s side for this undertaking.

The consideration is the consent of A. that X. should receive the money for him. The creditor A. suffers X. to be his agent to receive the money due to him from B. "There is," [therefore], "a consideration moving through the instrumentality of the original debtor [B.] to the defendant [X.] as agent for the plaintiff [A.]" (*t*). "The facts show that the defendant [X.] was the agent of the plaintiff [A.]. That agency supplies the consideration. To constitute an agency there must have been an agreement, either express or to be inferred from what has been said on one side and adopted on the other." (*u*)

The expression consideration is, in these transactions, used in a strained sense. The contract may possibly be considered one which is valid without the existence of any real consideration moving from the plaintiff to the defendant. At any rate in an action for money had and received a direct consideration moving from the
[95] plaintiff is seldom shown. (*x*) The matter to be considered, in order to determine whether the sender of the money, B., or the intended recipient, A., ought to sue the defendant, X., is, has or has not X. either expressly or by his acts agreed with A. to hold the money as the

(*t*) Lilly v. Hays, 5 A. & E. 550, per PATTISON, J.
(*u*) Ibid., 550, 551, per COLERIDGE, J.
(*x*) Lilly v. Hays, 5 A. & E. 550, per PATTISON, J.

money of A.; or in other words, whether the money has ceased to be the money of the original owner B. As long as B. can countermand the order to pay to A. the money is the money of B. But when X. has pledged himself to X. to hold the money as money of A., then B. can not countermand the order, and the money is the money of A. held by X. for his use. (*y*)

The inquiry whether X. has or has not undertaken to hold the money as the agent of A., for whom it is sent, often resolves itself into a nice question of fact.

B., residing abroad, remitted bills to X. & Co. (the defendants), his bankers in London, with directions to pay the amount of the bills in certain proportions to A. (the plaintiff) and other creditors of B. X. & Co. refused to act upon B.'s instructions, and though they received the amount due on the bills, did not pay A. It was held that no action could be brought by A. against X. & Co., since the defendants never assented to hold the money for the use of A., but held it to the use of B. and subject to his directions. (*z*)

"It will be observed," it is laid down in the judgment in this case, "that there is no assent on the part of the defendants to hold this money for the purposes mentioned in the letter [from B.], but on the contrary, an express refusal to the creditor [A.] so to do. If, in order to constitute a privity between the plaintiff and defendants, as to the subject of this demand, an assent express or implied be necessary, the assent can in this case be only an implied one, and that, too, implied against the express dissent of the parties to be charged. By [96] the act of receiving the bill, the defendants agree to hold it till paid, and its contents when paid, for the use of the remitter. It is [open] to the remitter to give and countermand his own directions respecting the bill as often as he pleases, and the persons to whom the bill is remitted may still hold the bill till received, and its amount when received for the use of the remitter himself;

(*y*) See Hodgson v. Anderson, 3 B. & C. 842.
(*z*) Williams v. Everett, 14 East, 582.

until, by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance they can not retract the consent they may have once given, but are bound to hold it for the use of the appointee. If it be money had and received for the use of the plaintiff under the orders which accompanied the remittance, it occurs as fit to be asked, when did it become so? It could not be before the money was received on the bill becoming due; and at that instant suppose the defendants had been robbed of the cash or notes in which the bill in question had been paid, or they had been burnt, or lost by accident, who would have borne the loss thus occasioned? Surely the remitter [B.], and not the plaintiff and his other creditors, in whose favor he had directed the application of the money according to their several proportions to be made. This appears to us to decide the question; for in all cases of specific property lost in the hands of an agent, where the agent is not himself responsible for the cause of the loss, the liability to bear the loss is the test and consequence of being the proprietor, as the principal of such agent." (*a*)

B., the acceptor of a bill of exchange which had been dishonored, transmitted to X. another bill, the proceeds of which were to be employed in paying the dishonored bill. X. undertook, in a letter to B, that the money should be carried to B.'s account. It was held (*b*) [97] that A., the holder of the dishonored bill, could not bring an action against X., for "where a party to whom a bill is remitted repudiates the trust with which the bill is clothed, that may give to the person remitting the bill a right to bring trover for it; but it does not give any right of action to the person on whose account the bill is directed to be applied, and unless some agreement had taken place between the defendant and the plaintiff,

(*a*) Williams v. Everett, 14 East, 596, 597, per CURIAM.
(*b*) Yates v. Bell, 3 B. & Ald. 643.

the former could only be considered as holding the bill for the use of [the remitter]." (*c*)

B. sent a bill to X. to be paid to A. in payment of a debt due from B. to A. X. got the bill accepted, and wrote to A., stating that he had a commission from B. to pay A. some money, and asking how it should be delivered. While the bill remained in X.'s hands, he received directions from B. not to pay A. until an investigation of accounts should have taken place. This investigation did not take place, and X. retained the bill, and did not pay A. It was held that A. could not sue X. The action was in form an action of trover, but the principle on which it was decided applies to an action for money received. (*d*)

"The only question is, whether there is anything to differ the case from Williams v. Everett in what has been done between the party to whom, and the party for whose use, the bill was remitted. The principle on which this case was put was, as stated by Lord ELLENBOROUGH, (*e*) that the remittees 'may hold the bill till received, and its amount when received, for the use of the remitter himself, until, by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person.' But instead of that, what is done here? There is, certainly, the letter of the defendant agreeing to [98] hold for the plaintiff, but there is no assent of the plaintiff to receive it as payment; it is only an inchoate offer, on the part of the agent, to hold the bill for the remittee, if he assents. I find no such appropriation here as is referred to by Lord ELLENBOROUGH." (*f*) It follows, therefore, that where X.'s consent to hold money of B. for the use of A. is only conditional, no action can be brought by A. until the condition is fulfilled. (*g*)

(*c*) Yates v. Bell, 3 B. & Ald. 645, judgment of ABBOTT, C. J.

(*d*) Brind v. Hampshire, 1 M. & W. 365.

(*e*) 14 East. 596.

(*f*) Brind v. Hampshire, 1 M. & W. 373, 374, judgment of BOLLAND, B.

(*g*) Malcolm v. Scott, 5 Exch. 601; Hudson v. Bilton, 6 E. & B. 565; 26 L. J. 27, Q. B.

The assent, on the other hand, of X. to hold money of B. for the use of A., gives A. a right of action. B., a debtor of A., transmitted to X. money, which X. admitted having received, and on being informed that it was meant to be paid to A., said that he would pay it to A., and this statement was repeated to A. by X.'s authority. It was held that A. could sue X. for money had and received, on the ground that X. had stated in effect that he held the money to A.'s use, and had allowed him to be told so, (*h*) and that the agency constituted between A. and X. was a sufficient consideration for the agreement on X.'s part to hold the money of A. The action could not, in this case, have been maintained unless the defendants had communicated to the plaintiff that they held the money for his use. Thus, where B. transmitted to X. & Co. money to be paid by them to A., and they promised B. to pay A., but had no communication with A., it was held that A. could not sue X. & Co. (*i*)

The question, who is the right plaintiff in an action for money received, is often complicated by the rules forbidding the assignment of the right to bring an action. (*j*)

[99] Suppose that B. owes A. £100, and that X. owes B. £100. In this case B., instead of sending money to A., perhaps directs X. to pay the £100 to A.

If X. does not pay A., the question whether A. or B. have a right of action against X. depends not only upon the answer to the question whether X. has assented to hold the £100 for the use of A., but also upon the reply to the further inquiry whether X.'s debt to B. has been extinguished. For otherwise there is no consideration for X.'s undertaking to incur a debt to A., and it is clear that B.'s claim against X. can not be directly transferred to A. In other words, by an agreement between the three parties B., X., and A., by which B. gives up his

(*h*) Lilly v. Hays, 5 A. & E. 548.

(*i*) Moore v. Bushell, 27 L. J. 3, Ex.

(*j*) See Rule 6, and Rule 15, Exception 3. Compare Lampleigh v. Braithwait, 1 Smith, L. C., 6th ed., 143, notes; Fleet v. Perrins, L. R. 4, Q. B. 500 (Ex. Ch.).

claim against X., and X. incurs a new liability to A., a contract may be formed between X. and A. But B. can not transfer to A. his right to sue X., and therefore A.'s right of action depends on the existence of this contract. X. (the defendant) was indebted to B., and B. was indebted to A. B. by a document in writing agreed to authorize X. to pay A. the amount of B.'s debt to A. At the foot of the document X. wrote the word "acknowledged." It was held that A. could not maintain an action against X. (*k*)

"There are two legal principles which as far as I know have never been departed from. One is that at Common Law a debt can not be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; (*l*) and that being the law it is perfectly clear that [B.] could not assign to the plaintiff [A.] the debt due from the defendant [X.] to him. . . The other principle which would be infringed by allowing this action to be maintained, is the rule of law that a bare promise can not be the foundation of an action. Ex nudo pacto non oritur actio. Applying these principles to the present case, I am clearly of [100] opinion that the action can not be maintained. . . . "There was nothing in the nature of a consideration moving from the plaintiff to the defendant; but a mere promise by the defendant to pay another man's debt. No doubt there are cases in which the courts have been desirous to give their sanction to arrangements of this kind. Amongst others, Lilly v. Hays (*m*) was cited; but in that case the defendant had a sum of money in his hands, which he admitted that he held for the plaintiff's use, and promised to pay it to him; so that he was in the situation of an agent for the plaintiff, and on that ground it was held the plaintiff might recover it as money received to his use. The same observation applies to the case of Walker v. Rostron. (*n*) There the agent for the

(*k*) Liversidge v. Broadbent, 4 H. & N., 603; 28 L. J. 332, Ex.
(*l*) Rule 15, Exception 2.
(*m*) 5 A. & E. 548.
(*n*) 9 M. & W. 411; 11 L. J. 173, Ex.

purchaser of goods undertook, by an agreement which the vendor and purchaser were also parties, to pay bills of exchange, given for the price of the goods, out of certain specified funds which he expected to receive, and that was held to be an appropriation of the funds, irrevocable except by the consent of all parties. The same principle prevails with respect to bankers. A banker is in the position of a person having in his hands the money of another which he is at any moment liable to be called upon to pay, and the courts have grasped at that to make a contract between the banker, his customer, and a third party, for the payment of money to the latter, operate as a transfer of the money, so that an action for money had and received can be maintained for it. Here there is no money had and received to the use of the plaintiff. In Israel v. Douglas, (*o*) there was a consideration to support the promise. Here there is nothing more than a transfer of a chose in action; and without violating the two rules of law to which I have adverted, this action can not be maintained." (*p*)

[101] B. was indebted to A. (the plaintiff), and agreed with X. & Co. (the defendants), who were indebted to B., that they should discount bills drawn by B. and accepted by X. A. presented the bills to X. & Co., who were bankers. X. & Co. would not immediately pay A. the amount of the bills, but gave a check to B.'s clerk, which, as well as a further amount due on the bills, they promised to pay next day on B.'s order. X. & Co. received B.'s order, but afterwards, on B. having stopped payment, refused to pay A. It was held that A. might sue X. & Co. for money received, on the ground that from the time of receiving B.'s order, the defendants held the money for the use of the plaintiff. (*q*)

(*o*) 1 H. Black. 239.
(*p*) Liversidge v. Broadbent, 4 H. & N. 611, 612, judgment of MARTIN B.
(*q*) Noble v. National Disct. Co., 5 H. & N. 225; 29 L. J. 210, Ex.

RULE 12. —The person to sue for the breach of a contract by deed is the person with whom the contract is expressed by the deed to be made; *i. e.*, the covenantee. (*r*)

A covenant is an agreement by deed. (*s*) In every covenant, therefore, there is a covenantor who promises, and a covenantee (*t*) to whom the promise is made. The person to bring an action for a breach of the covenant must be the covenantee.

This rule holds good because a covenant differs from a simple contract in the following particulars. A covenant is good without the existence of any consideration to induce the covenantor to enter into the covenant, [102] (*u*) whilst a simple contract is not valid if made without a consideration. A covenant, again, is not a covenant with any person except the covenantee; but a simple contract, though made on the face of it with one person, and therefore giving him a right to sue upon it, may be often treated as a contract made with some other person whose name does not appear on the face of the contract, but who, as being the person really contracted with, has a right to sue upon the contract. (*v*)

X., for example, covenants with A. to pay him £10. A. can sue X. if the covenant be broken, even though there were no consideration whatever to induce X. to enter into the covenant. Suppose, again, that it were perfectly well known that the covenant was made with A., simply as agent for M., and was intended for M.'s benefit, still if it appeared on the face of the deed to be a covenant with

(*r*) Or the representative of such person. See Rule 10, note (*a*), *ante*.

(*s*) Davidson, Precedents, 2nd ed., 101; Touch. 160.

(*t*) In the case of a bond, the person who undertakes the obligation, or the promisor, is called the obligor, and the person in respect of whom the obligation is undertaken, or the promisee, is called the obligee.

(*u*) Compare Rule 11. This appears a more accurate way of stating the law than the statement which is often made, that the law presumes a consideration in the case of an agreement by deed. (See 1 Selwyn, N. P., 13th ed. 420.)

(*v*) See Chapter V.

A., an action for the breach of it would have to be brought by A., and could not be brought by M. (*x*)

A covenantee may in general sue on a covenant in a deed which he has not executed, and by the provisions of which he therefore is not bound, (*y*) for the cases establish that "a covenantee in an ordinary indenture who is a party to it may sue the covenantor who executed it, although he himself never did; for he is a party, although he did not execute, and parties to an indenture may sue, although strangers can not, and it makes no difference that the covenants of the defendant are therein stated to be in consideration of those of the covenantee." (*z*)

SUBORDINATE RULE.

[103] *No one can sue on a covenant in an indenture* (*a*) *who is not mentioned among the parties to the indenture.*[1]

The meaning of this rule is, that everyone is a stranger to a deed inter partes who is not one of the parties to it, and that, therefore, no one not a party can sue upon any contract contained in it.

Suppose an indenture to which the parties are A. of the one part and X. of the other part, and that this indenture contains a covenant by X. with M. to pay M. £20, M. can not sue X., because M. is not a party to the indenture.

"The rule and distinction as to deeds inter partes and deeds not of that character is very old, and to be found in the ancient legal authorities; but it is impossible to

(*x*) In the case of a simple contract, M., as the principal really interested, could sue. See Rule 17, Exceptions 4, 5.

(*y*) Leake, Contracts, 84.

(*z*) Pitman v. Woodbury, 3 Exch. 11, per CURIAM. But conf. Swatman v. Ambler, 8 Exch. 72; How v. Greek, 3 H. & C. 391; 34 L. J. 4, Ex.

(*a*) A deed is either a deed-poll, *i. e.*, a deed made by one party only, and addressed to the world generally, or a deed inter partes, called otherwise an indenture, purporting to be made between A., of the one part and X., &c., of the other part. 1 Steph., Com., 6th ed., 499.

And see Scott v. Calvitt, 4 Miss. (3 How.) 148.

state or illustrate it more clearly than is done by Lord TENTERDEN, in his book on Shipping. . . . He states the rule to be a technical one, and thus illustrates it:—'If a charter-party under seal is expressed to be made between certain parties as between [W.] and [X.], owners of a ship whereof [A.] is master, of the one part, and [Y.] and [Z.], of the other part, and purports to contain covenants with [A.], nevertheless [A.] can not bring an action in his own name upon the covenant, and this even although he sealed and delivered the instrument; but if the charter-party is not expressed to be made between parties, but is written thus, "This charter-party indentured witnesseth," it is otherwise.' He adds. . . . . In the case of Berkeley v. Hardy (*b*) the same rule is laid down, and in the judgment it is stated to be a long established technical rule, and one believed to be peculiar to the law of England."(*c*)

It is not essential that a person, in order to be a party, should be described among the parties by [104] name. It is enough if the class to which he belongs is sufficiently designated among the parties. (*d*)

Under 8 & 9 Vict. c. 106, s. 5, persons who are not parties may in the case of indentures executed after 1st October, 1845, sue on covenants in such indentures which relate to tenements and hereditaments.

RULE 13.—All the persons with whom a contract is made must join in an action for the breach of it.[1]

"A contract by one person with two jointly does not comprehend or involve a contract with either of them

(*b*) 5 B. & C. 355.

(*c*) Chesterfield Colliery Co. v. Hawkins, 3 H. & C. 692, per MARTIN, B.

(*d*) Isaacs v. Green, L. R., 2 Ex. 352; 36 L. J. 253, Ex.; M'Laren v. Baxter, L. R., 2 C. P. 539; Sunderland Ins. Co. v. Kearney, 20 L. J. 417, Q. B.; 16 Q. B. 925.

[1] The question as to the joinder of parties, being one of the principal grounds upon which a demurrer will lie, is one of great importance, and of frequent adjudication. I. JOINDER

separately," as "is evident from the well-known doctrine, that a covenant or promise to two, if proved in an action brought by one of them, sustains a plea which denies the

OF PLAINTIFFS.—*In actions at law.*—One who has no right or title to sue, can not be joined with others who have; Lillard v. Ruckers, 9 Yerg. 64; but all who have a legal interest in the contract must join in an action for the breach thereof. Omission of any party thus interested is fatal, and need not, and ought not, to be pleaded in abatement, but may be taken advantage of at the trial. Conolly v. Cottle, 1 Ill. (Breese) 286; Baker v. Jewell, 6 Mass. 460; Doremus v. Selden, 19 Johns. (N. Y.) 213; Ulmer v. Cunningham, 2 Me. (2 Greenl.) 117; Waldsmith v. Waldsmith, 2 Ohio, 156; Robinson v. Scall, 3 N. J. L. (2 Penn.) 817; Halliday v. Doggett, 6 Pick. 359; Beach v. Hotchkiss, 2 Conn. 697; Gordon v. Goodwin, 2 Nott. & M. (S. C.) 70; Sims v. Tyre, 1 Treadw. (S. C.) Const. 123; Hilliker v. Loop, 5 Vt. 116; Allen v. Luckett 3 J. J. Marsh, 165; Ellis v. M'Lemoor, 1 Bailey, 13; Dob v. Halsey, 16 Johns. 34; Ehle v. Purdy, 6 Wend. 629; Coffee v. Eastland, Cooke (Tenn.) 159; Hall v. Adams, 1 Aik. 166; Sweigart v. Berk, 8 Serg. & R. 308; Morse v. Chase, 4 Watts, 456; M'Intosh v. Long, 2 N. J. L. (1 Penn.) 274; Hansel v. Morris, 1 Blackf. 307. The following are some of the rules to be observed: When a contract is made with several jointly, all should sue for its breach, unless the case exhibits some good reason why they should not; death or refusal to join might perhaps be such reasons. Hays v. Lasater, 3 Ark. 565; Moody v. Sewall, 14 Me. 295; Sims v. Tyre, 3 Brev. 249. Several persons having separate and distinct interests in a chattel can not unite in a replevin. Chambers v. Hunt, 18 N. J. L. (3 Har.) 339. An action for the loss of a child, killed by the negligence or misconduct of a railroad company, may be brought in the name of both parents; Pennsylvania R. R. Co. v. Zebe, 37 Pa. St. 420; and if the action be for negligence in causing the death of a father, it may be properly brought in the name of all the children; since the recovery is for the benefit of all, the amount to be distributed as in case of intestacy; North Pennsylvania R. R. Co. v. Robinson, 44 Id. 175. Where payment is made by several from a joint fund, they must join in a suit for reimbursement; but if the payment, though jointly made, was from individual funds, the rule will be otherwise. Parker v. Leek, 1 Stew. 523; Pearson v. Parker, 3 N. H. 366; Doremus v. Selden, 19 Johns. 213;

existence of the contract." (*e*) If X. contract with A. and B. jointly, *e. g.*, by his promissory note, to pay them £20, an action must be brought for a breach of contract

(*e*) Wetherell v. Langston, 1 Ex. 644, per CURIAM. See Cabell v. Vaughan, 1 Wms. Saund. 291*i*, 291*k*.

Smith v. Hicks, 1 Wend. 206. Parties to a wager who deposit stakes with a stakeholder must sue separately to recover. Mytinger v. Springer, 3 Watts & S. 105. Two persons can not join in suing for an injury done to one of them; Winants v. Denman, 2 N. J. L. 124; nor can two constables, who have levied on the same property, join in an action against one who takes possession of it; Warne v. Rose, 5 N. J. L. 809. Where there are several joint owners of a fund they must all join in a suit to recover it, and each may use the names of all in prosecuting the suit, but one of them may not dismiss the suit as to himself. Gray v. Wilson, 1 Meigs, 394. Where there is no community of interest, parties can not join in an action; and, therefore, the obligors in two several bonds, who had incurred different liabilities, may not join in a writ of error. Jones v. Etheridge, 6 Port. (Ala.) 208. A contract entered into by A. in favor of B. and C. can not be sued by B. C. and D., D. being a stranger. Scott v. Patton, 1 A. K. Marsh (Ky.) 441. A promise to A. to pay several other persons in equal portions, where it is not intended that they shall receive or recover the entire sum, and divide it, does not warrant a joint suit; each must bring a separate action. Owings v. Owings, 1 Har. & Gill (Md.) 484. Subcontractors, subsequently admitted to participate in the benefit of a contract, without the privity and consent of the promisor, can not join in a suit on the contract. Blakeney v. Evans, 2 Cranch, 185; Barstow v. Gray, 3 Me. (3 Greenl.) 409. Where two vessels are under a contract of mateship, there is no such joint property in a whale taken by one of them as requires the owners of both to join in an action for its tortious conversion. Taber v. Jenny, Sprague, 315. Persons severally signing a note as sureties can not maintain a joint action on the case for aiding their principal fraudulently to conceal or transfer his property, even if, since the acts charged, they have given a joint note to take up the original note. Bunker v. Tufts, 55 Me. 180. A., B., and C., of the first part, entered into a written agreement with D., of the second part, describing themselves as "a committee of certain subscribers to a fund"

by A. and B., and can not be brought by either A. or B. separately.

X. contracted with A., on behalf of the members of an

The agreement contained stipulations by and in favor of the party of the first part, and was signed by A., "in behalf of himself and the rest of the committee." In an action brought by A., B., and C. against D. for a breach of the agreement,—held, that the legal interest was in the plaintiffs alone, and that the action was properly brought in their names, without joining the other subscribers to the fund. Potter v. Yale College, 8 Conn. 52; and see Moore v. Chesley, 17 N. H. 151. On the death of two joint obligees the right of action vests in the survivor; and on his death, in his personal representatives alone; and a joinder of the representatives of both obligees is a misjoinder; Bebee v. Miller, Minor (Ala.) 364; and the declaration must set out the contract as it existed, and show the interest of the plaintiff to be that of the survivor; Callison v. Little, 2 Port. 89; Freeman v. Curran, 1 Minn. 169. All the joint owners of personal property are rightly joined in action of trespass for injury to that property. Glover v. Austin, 6 Pick. (Mass.) 571; Pickering v. Pickering, 11 N. H. 141. Tenants in common may join in an action of waste. Greely v. Hall, 3 Harr. (Del.) 9; and see Gillmore v. Wilbur, 12 Pick. 309. Where part owners of a vessel sue ex contractu, all of them must join; and advantage may be taken of non-joinder after general issue pleaded. White v. Curtis, 35 Me. 534. Where several owners of a vessel are interested in the cargo, they are properly joined in an action against a factor for the balance of the proceeds, as settled by one of them, the account being stated as with the owners. Jellison v. Lafonta, 19 Pick. (Mass.) 244. Where several persons have a joint title to an estate, any one or more of them may sue, without joining the others, and recover against him who has no title. Clark v. Vaughan, 3 Conn. 101. In personal actions for trespass to lands, tenants in common must join; but if a party who ought to join be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages at the trial. Gent v. Lynch, 23 Md. 58. Towns can not join, as tenants in common, in a writ of entry. Rehoboth v. Hunt, 1 Pick. (Mass.) 224. Where several persons jointly procure insurance on a vessel owned by them jointly, they can not, in case of a loss, while the ownership remains the same, maintain separate actions to recover their several shares

orchestra to which A. himself belonged, that he would make them certain payments. It was held that the contract being (under the circumstances of the case) a

of the loss, but all must join. Blanchard v. Dyer, 21 Me. 111. Tenants in common, holding under one and the same deed, are not obliged to join in an action against their grantor for a breach of the covenant of warranty in such deed. Swett v. Patrick, 11 Me. (2 Fairf.) 179. Joint owners of goods must join in replevin to recover them. M'Arthur v. Lane, 15 Me. 245; Smoot v. Wathen, 8 Mo. 522. Where some of several heirs destroy the title-deeds of the ancestor, the other heirs may join in an action against them. Daniels v. Daniels, 7 Mass. 135. Tenants in common can not join in an action against the vendor for a fraudulent assertion of the value of the property. Baker v. Jewell, 6 Mass. 460. Misjoinder of plaintiffs in actions ex delicto is equally fatal as in actions ex contractu, and may be taken advantage of at the trial. Thus, where A and B. sued for trespass on their goods, and it was shown at the trial that the property belonged to A. alone, the plaintiffs were nonsuited. Glover v. Hunnewell, 6 Pick. (Mass.) 222. So where two or more join in a qui tam or popular action, to recover a penalty—as there can be no joint interest in a penalty unless expressly so given by statute. Vinton v. Welsh, 9 Pick. 87; Hill v. Davis, 4 Mass. 137. Courts of equity are slow to dismiss suits for non-joinder or misjoinder of parties where the difficulty can be remedied, or relief be given, without impairing or jeopardizing the interest of any one; Bunce v. Gallagher, 5 Blatchf. 481; and the court will not dismiss a bill for misjoinder of complainants unless their interests are so diverse that he can not with propriety include them in one decree. Michan v. Wyatt, 21 Ala. 813. But see Clason v. Lawrence, 3 Edw. 48; Bowie v. Minter, 2 Ala. 406. *In equity.*—Parties having no community of interest can not be joined in the same bill; Armstrong v. Athens County, 10 Ohio, 235; Ohio v. Ellis, 10 Ohio, 456; Moore v. Moore, 17 Ala. 631; Wilkins v. Judge, 14 Ala. 135; Neely v. Anderson, 2 Strobh. (S. C.) Eq. 262; and all the parties to an original decree should join in a bill of review to reverse it; Sturges v. Longworth, 1 Ohio St. 544. A court of equity can make no decree in a suit which involves the right of one not a party in such a way that complete justice between the parties can not be done without affecting the third party's right. Shields v. Barrow

contract with A. and the other performers, A. could not sue alone for its breach, and the question raised in the case, was not whether A. could sue alone on a contract

17 How. 130. Where trustees are interested in the subject matter of a suit all must be made parties. Sayre v Sayre, 17 N. J. Eq. 349. Complainants for distinct injuries can not unite in the same bill. Plum v. Morris Canal and Banking Co., 10 N. J. Eq. (2 Stock.) 256. Parties can not join in a suit in equity to restrain the imposition of a tax which would be a lien only upon their respective lands, and not upon any common property owned by them. Magee v. Cutler, 43 Barb. (N. Y.) 239. Parties having conflicting interests, each claiming the title to the property in dispute to be in himself, can not unite as plaintiffs, and a bill containing an averment that one of the plaintiffs is entitled and that if he is not his co-plaintiff is, can not be separated. Ellicott v. Ellicott, 2 Md. Ch. 468. On a contract to do certain work for two parties one of them can not have relief in equity without making the other a party, or stating an excuse for not so doing. New Braintree v. Southworth, 4 Gray (Mass.) 304. Where a third party was to act as umpire between two others,—held, that he was not a necessary party to a suit between the two, it not appearing that he had any interest in the matter in dispute. Neale v. Keele, 2 T. B. Mon. 31. The supreme court of the United States will not make a final decree upon the merits of a case unless all persons who are essentially interested are made parties to the suit, although some of those persons are not within the jurisdiction of the court. Russell v. Clark, 7 Cranch, 69. All persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested; but this rule is subject to many exceptions, and is more or less within the discretion of the court, and ought to be restricted to parties whose interests are involved in the issue, and to be affected by the decree, and the relief granted will always be so modified as not to affect the interest of others. Prentice v. Kimball, 19 Ill. 320; Fletcher v. Mansur, 5 Ind. 267; Duncan v. Mizner, 4 J. J Marsh (Ky.) 443; Gilham v. Cairns, 1 Ill. (Breese) 124; Baily v. Mayrick, 36 Me. 50; Mandeville v. Riggs, 2 Pet. 482; Caldwell v. Taggart, 4 Id. 190; West v. Randall, Mass. 181; Society for the Propagation of the Gospel v. Hartland,

with A. and B. jointly, but whether the particular contract was a joint contract. (*f*)

X. covenants with A. and B. Neither A. nor B. [105] can sue separately for a breach of the covenant;

(*f*) Lucas v. Beale, 10 C. B. 739; 20 L. J. 134, C. P. If A. had been acting merely as agent for the orchestra, and the contract had been with him, he migh probably have sued (see Rule 17, Exception 4). But he was himself one of the parties with whom the contract was made, and not a mere agent with whom a contract was made on behalf of others.

2 Paine 536; Northern Indiana R. R. Co. v. Michigan Central R. R, 5 McLean, 444; Noyes v. Sawyer, 3 Vt. 160, Crocker v. Higgins, 7 Conn. 342; New London Bank v. Lee, 11 Id. 112; Hawley v. Cramer, 4 Cow. (N. Y.) 717; Turner v. Berry, 8 Ill. (3 Gilm.) 541; Bruff v. Leder, 10 Id. (5 Gilm.) 210: Bonham v. Galloway, 13 Ill. 68. Whitney v. Mayo, 15 Id. 251; Oliver v. Palmer, Gill & J. 426; Clark v. Long, 4 Rand. 451; Vaun v. Hargett, 2 Dev. & B. Eq. 31; Frazer v. Legare, 1 Bailey (S. C.) Ch. 389; Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; West v. Randall, 2 Mass. 181. Park v. Ballentine, 6 Blackf. (Ind.) 223; Connell v. Chandler, 11 Tex. 249; Hall v. Hall, Id. 526; Wilson v. Castro, 31 Cal. 420; Gilmore v. Johnson, 14 Ga. 683; Mechanics' Bank v. Seton, 1 Pet. 299; Story v. Livingston, 13 Id. 359; Hussey v. Dole, 24 Me. 20; McConnell v. McConnell, 11 Vt. 290; Busby v. Littlefield, 31 N. H. (11 Fost.) 193; Brasher v. Van Cortland, 2 Johns. (N. Y.) Ch. 242; De la Vergne v. Evertson, 1 Paige (N. Y.) 181; Armstrong v. Pratt, 2 Wis. 299. II. JOINDER OF DEFENDANTS.—*In actions at law.*—Misjoinder of defendants in actions ex contractu is fatal in whatever stage of a cause it is shown. The plaintiff must show a joint subsisting liability of all the defendants or he can not recover against either. Wolcott v. Canfield, 3 Conn. 194; Kimmel v. Shultz, 1 Ill. (Breese) 128; Livingston v. Tremper, 11 Johns. (N. Y.) 101; Tom v. Goodrich, 2 Id. 213; Blight v. Ashley, Pet. C. Ct. 16; Erwin v. Divine, 2 T. B. Mon. (Ky.) 124; Jenkins v. Hurt, 2 Rand. (Va.) 446; Tuttle v. Cooper, 10 Pick. (Mass.) 281, Brown v. Warner, 2 J. J. Marsh, 38; but see Swigert v. Graham, 7 B. Mon. 667. But in an action of tort the non-joinder of defendants is no defense; Milford v. Holbrook, 9 Allen (Mass.); and the non-joinder of a secret partner, pleaded in abatement, is no bar to an action by indorsees without notice. New York Dry Dock Co. v. Treadwell, 19 Wend. 525. In some states the non-joinder of a joint promisor is matter of abatement

and even if B. has not executed the deed, still he must join with A. in an action on the covenant, (*g*) for the parties who have not sealed may sue together with those who

(*g*) Petrie v. Bury, 3 B. & C. 353.

only, and can not avail the party under the general issue. Nash v. Skinner, 12 Vt. 219; Lurton v. Gilliam, 2 Ill. (1 Scam.) 577; Means v. Miliken, 33 Pa. St. 517; Ives v. Hulet, 12 Vt. 314; Hicks v. Cram, 17 Id. 449. On demurrer, a plea in abatement was held good in South Carolina, in an action on a joint bond, against the representatives of one party deceased, the other party living at the time in another state. Boykin v. Watson, Mill. (S. C.) Const. 157. Where a declaration disclosed another person who should be made a party, if living, but fails to show whether he is alive or dead, the non-joinder may be taken advantage of by special demurrer. Burgess v. Abbott, 6 Hill (N. Y.) 135; 1 Id. 477. Tort-feasors of personalty can not plead non-joinder in abatement; and the objection comes too late after the defendant has pleaded in chief. Graham v. Houston, 4 Dev. (N. C.) L. 232. In equity, where the want of proper parties defendant is apparent on the face of a bill, the court will not proceed until the proper parties are before it. Brown v. Johnson, 53 Me. 246. But the mere joinder or non-joinder of formal parties will not oust the court of its jurisdiction in an equity cause, but it will rather proceed without them, and decide upon the merits of the case between the parties who have the real interests before it, whenever it can be done without prejudice to the rights of others. Wormley v. Wormley, 8 Wheat. 421; Bugbee v. Sargent, 23 Me. 269. And when the obtaining of all necessary parties defendants would cause great delay and expense, and justice can be done between the parties before the court without affecting the interests of the others, the court will proceed to decree notwithstanding the want of parties. Boisgerard v. Wall, 1 Smed. & M. (Miss.) Ch. 404; Gorman v. Russel, 14 Cal. 531. The court will not allow the general rule, that all persons interested in the object of the bill are proper parties, to be enforced when it would defeat the purposes of justice. United States v. Parrott, 1 McAll. 271; Wyche v. Greene 11 Ga. 159. A distinction is made between nominal, necessary, and indispensable parties. The two former may be dispensed with; but the latter never. Tobin v. Walkinshaw, 1 McAll. 26. In a suit in equity to set

have sealed, and as they may sue, they must sue, and an action can not be maintained without them. (*h*)

Nor does it make any difference that the covenantee who has not executed a deed does not assent to the covenant, and afterwards disclaims it. It is still necessary that he should join with his co-covenantee in an action for the breach of covenant. Thus, where X. covenanted with A. and B. jointly, and B. did not execute the deed, but refused his assent to the covenant, and afterwards disclaimed it in a deed to which X. was no party, it was held that A. could not sue X. without joining B. "The meaning of the words of the covenant . . . . is that the defendant will pay the two covenantees," and "that meaning is the same whether they accept the covenant or not, and the acceptance of the one, and the refusal of the other, does not convert it into a covenant to one only." (*i*) It was also held that A. could not in this case (*j*) compel B. to let his name be used, since the court would, on B.'s application, strike out his name when used as a co-plaintiff, (*k*) and hence, in effect, that A. could neither directly nor indirectly bring an action without the assent of B.

It is often hard to determine who are the persons with whom a given simple contract is made, and who, therefore, must sue for its breach. The difficulty is often, though, not invariably one of interpretation, *i. e.*, [106] of determining from the words of a given contract whether it is to be interpreted as a contract with A. and B. jointly, or a contract with A. and B. severally. (*l*)

(*h*) Ibid. 355, judgment of ABBOTT, C. J.
(*i*) Wetherell v. Langston, 1 Exch. 644, per CURIAM.
(*j*) But see *post*.
(*k*) Langston v. Wetherell, 27 L. J. 400, Ex.
(*l*) See as to interpretation, *post*.

aside a conveyance in trust as being fraudulent as to creditors, it is sufficient to sustain a demurrer to the bill that some of the creditors, whose interests would be affected by the decree, were not made parties thereto. Thornberry v. Baxter, 24 Ark. 76. An objection for want of parties should point out the parties who ought to be joined. Houghton v. Mariner, 7 Wis. 244.

Where the question is not one merely of interpretation the main principles for the determination of this question are as follows:—

1st. Where there is a separate consideration proceeding from different persons, there is considered to be a contract with each of them, and they, therefore, can not join in an action for breach of contract. Thus, where two persons contracted to assist the defendant with their respective horses, and were to give in their accounts separately, it was held that there was a separate contract with each of them, and that they could not bring a joint action for the hire of their horses. (*m*)

2ndly. Where the consideration moves from several persons jointly, such persons, as having the joint legal interest in the contract, should be joined as plaintiffs in suing for a breach of contract. (*n*) Thus, where X. contracted with A. for the service of A. and of other persons, and the consideration (*sc.* the joint services of A. and these persons), proceeded from A. and them, it was held that the contract was a joint contract with A. and the other persons thereto, and that they must join in suing for its breach. (*o*) Where, again, A. and B. who were bail, employed X. to surrender their principal, it was held that the only contract which the law could imply was a contract with A. and B. jointly, and that A. could not sue alone for a breach of the contract. (*p*) "Taking the case most favorably for the plaintiff, [A.] and supposing [107] the whole consideration to have been paid by himself and [B.], they were jointly interested, and neither of them could maintain a separate action." (*q*)

It has been laid down, that "though the consideration be joint, yet, if the promise is several, the several prom-

(*m*) Smith v. Hunt, 2 Chit. 142; Brand v. Boulcott, 3 B. & P. 235.

(*n*) Broom. Parties, s. 20. Hill v. Tucker, 1 Taunt. 7; Coryton v. Lithebye, 2 Wms. Saund. 116*a*; Chanter v. Leese, 4 M. & W. 295; Lucas v. Beale, 10 C. B. 739; 20 L. J. 134, C. P.; Pugh v. Springfield, 3 C. B., N. S., 2; 27 L. J. 34 C. P.

(*o*) Lucas v. Beale, 10 C. B. 739; 20 L. J. 134, C. P.

(*p*) Hill v. Tucker, 1. Taunt. 7.

(*q*) Hill v. Tucker, 1 Taunt. 9, per CHAMBRE, J.

isee [*i. e.*, the person to whom the separate promise is made] may sue alone." (*r*)

This statement rests on cases such as the following:—

In consideration that A. and B. would sell to X. their partnership business, X. promised A. to pay him certain sums of money, and it was held, on a motion in arrest of judgment, that A. could maintain an action against X. without joining B. (*s*)

"It is true," it was said by PARKE, B. in this case, "that no stranger to a consideration can sue; but in the present case the separate interest of the plaintiff in the partnership fund is the consideration upon which the promise is founded." (*t*)

A partner, again, has been held capable of maintaining an action upon an agreement in writing made with him alone, although the agreement related to the business of the firm, and the consideration was a release by the partners in question of a debt due to the firm. (*u*) Here, also, stress was laid by the court upon the fact that under the complicated circumstances of the transactions between the parties there was a separate consideration moving from the plaintiff for the contract with him.

These cases are not, therefore (it is submitted), inconsistent with the principle that an action for a breach of contract should be brought by all the persons from whom a joint consideration moves. They go to show that where the consideration is divisible, so that one [108] part of it may be treated as proceeding from one only of the parties to the contract, this separate consideration will support a separate promise to the party from whom it proceeds, who, therefore, may sue alone for the breach of such promise.

One of two co-plaintiffs has a right (*v*) to bring an

(*r*) Lush, Practice, 3rd ed., 21.

(*s*) Jones v. Robinson, 1 Exch. 454; 17 L. J. 36, Ex.

(*t*) Jones v. Robinson, 1 Exch. 456, judgment of PARKE, B.

(*u*) Ajacio v. Forbes, 14 Moo., P. C. 160.

(*v*) Constrast Langston v. Wetherell, 27 L. J. 400, Ex., cited *ante*, with Emery v. Mucklow, 10 Bing. 23. The difference seems to be that the Courts will not force a person to be treated as a party with whom a contract is made,

action in the name of both, (*x*) nor has the court any power to interfere, unless the co-plaintiff's name be used, not only against his will, but fraudulently. (*y*) Hence "one of several partners has a right to use the name of the firm" (*z*) in order to bring an action. But a co-plaintiff whose name is used without his permission is not without protection.

1st. He may obtain an indemnity against costs from the party who makes use of his name; (*a*) *i. e.*, he may apply to the court to have such party's proceedings stayed till he gives security for costs. (*b*)

2ndly. He may release or settle the action. (*c*)

Any one of several co-plaintiffs may give the defendant a release from the action, which is good, and may be pleaded, unless it is fraudulent. (*d*)

[109] When two of several co-plaintiffs gave a release to the defendant, the court refused to interfere. (*e*)

"No doubt this is . . . an exercise of a strict legal right in a manner very mischievous and injurious to the other plaintiffs, and for which the parties may perhaps be responsible to another tribunal; but we have no power to interfere if there be the smallest right or real interest on which the release may operate at law. If the plaintiff [A.] is not suing altogether on behalf of the other plaintiffs—if he be not a mere name—the release by him is effectual, and we ought not to interfere. A court of law has no machinery for working out the equities of these

when he has never assented to its being made with him; but that where two persons have allowed a contract to be made with them, the Courts will allow one of the two to use the name of the other in an action for its breach.

(*x*) Emery v. Mucklow, 10 Bing. 23.

(*y*) Ibid. 24.

(*z*) Whitehead v. Hughes, 2 D. P. C. 259. Strictly speaking, the names of co-partners for actions are not brought in the name of the firm. See Rule 20.

(*a*) Whitehead v. Hughes, Ibid. 258.

(*b*) Laws v. Bott, 16 M. & W. 300. The plaintiff whose name is used has not, however, in all cases an absolute right to an indemnity against costs. Emery v. Mucklow, 10 Bing. 23.

(*c*) Crook v. Stephens, 5 B. N. C. 688; Johnson v. Holdsworth, 4 D. P. C. 63; Herbert v. Piggott, 2 C. & M. 384.

(*d*) Rawstorne v. Gandell, 15 M. & W. 304; 15 L. J. 291, Ex.

(*e*) Ibid.

conflicting interests. In truth, the application is neither more nor less than a bill in equity to discover whether [A.] is or is not still interested in the concern." (*f*)

"We can not interfere to prevent the defendants from pleading the release, unless a clear case of fraud between them and the releasors, to the prejudice of their co-plaintiffs be made out, or unless it be shown that the release was executed by persons who were suing as mere trustees, having no real interest in the subject-matter of the action. But so long as a person has shares in such an undertaking, he has an interest which, however small it be, is sufficient to enable him to release an action in which he is a plaintiff; and the case is quite different from the familiar one of assignor and assignee, in which the courts for the first time interposed in this way. The plaintiff [A.] holds fifty shares in this undertaking, and is, therefore entitled at law to release the claim of the company, subject to his responsibility to his co-partners for so doing. It is not shown upon these affidavits that he ever agreed with the other plaintiffs not to release the action; it is shown, indeed, that he agreed that the demand should be enforced in his name, but that can not prevent him from executing a release to the defendants if he think fit. In the common case of two co-plaintiffs [110] equally interested, if one of them thinks fit, out of pure friendship to the defendant, to release the action, the court can not on that account interfere to set the release aside." (*g*)

But the court will set aside a release if it be manifestly shown to be fraudulent. (*h*) The fraud, however, must be clearly made out, for "where a co-plaintiff is by law competent to give a release," and "the court are called upon to set it aside upon the ground of fraud, the plaintiff applying must make out a very strong case of fraud;" (*i*) and the release certainly can not be got rid of unless

(*f*) Rawstorne v. Gandell, 15 M. & W. 307, per POLLOCK, C. B.
(*g*) Ibid. 307, 308, judgment of PARKE, B.
(*h*) Jones v. Herbert, 7 Taunt. 421.
(*i*) Ibid., 422, per CURIAM.

fraud is manifestly proved. (*k*) It would further seem that the release may be got rid of where the co-plaintiff whose name is used has no real interest in the action. (*l*) Such a release, would, however, almost necessarily be fraudulent.

Though the courts may, apparently, still set the plea of a release aside, the right course is now to state in an equitable riplication the grounds on which the release can be objected to. (*m*)

RULE 14.—One and the same contract, whether it be a simple contract or a contract by deed, can not be so framed as to give the promisees [111] or covenantees the right to sue upon it both jointly and separately. (*n*)

A contract (*o*) can not be made so as to entitle several persons under it both jointly and severally. They must be entitled under it either jointly only, or severally only, and must sue accordingly. (*p*)

In other words, a covenant "may be either a joint or several covenant, and it will depend upon the context whether it is to be taken as joint or several, but it can not be both." (*q*) For, "it is fully established . . . that one

(*k*) Philips v. Claggett, 11 M. & W. 84; 12 L. J. 275, Ex.

(*l*) Ibid.; Rawstorne v. Gandell, 15 M. & W. 304; 15 L. J. 291, Ex.

(*m*) De Pothonier v. De Mattos, E. B. & E. 461; 27 L. J. 260, Q. B. See further, as to nominal and real plaintiffs, *ante*.

The cases in which an action on a contract may be brought, either by a principal or agent, constitute, in a sense, an exception to the rule that all the persons must sue with whom a contract is made. See Chapter V.

(*n*) Bullen, Pleadings, 3rd ed. 471. Slingsby's Case, 5 Coke, 18*b*; Bradburn v. Botfield, 14 M. & W. 559; Keightley v. Watson, 3 Exch. 716, 723.

(*o*) The cases refer almost wholly to covenants, and, therefore, in considering this rule reference is made to covenants only. But the rule seems to apply to all contracts in writing. Compare Pugh v. Stringfield, 3 C. B., N. S., 2; 27 L. J. 34 C. P.; 4 C. B., N. S., 364; 27 L. J. 225, C. P.; Owston v. Ogle, 13 East, 538. Broom, Parties. 2nd ed., ss. 20, 21; Bullen, Pleadings, 3rd ed., 471.

(*p*) Bullen, Pleadings, 3rd ed., 471.

(*q*) Keightley v. Watson, 3 Exch. 726, judgment of ROLFE, B.

and the same covenant can not be made both joint and several as regards the covenantees." (*r*)

One and the same covenant with A. and B. must either be a covenant with both of them jointly: *i. e.*, a covenant with A. and B. collectively or a covenant with each of them separately; *i. e.*, a covenant with A. separately, and with B. separately. In the first case, A. and B. must join in suing for a breach of the covenant. In the second case, A. must sue separately, and B. separately. A several or separate covenant, in fact, with two or more persons is only two or more separate covenants expressed in a short form.

All the rule lays down is, that what is in law one covenant can not be, as regards the covenantees, at once joint and several. It may well be that what would appear to an ordinary reader but one covenant, is [112] in fact two covenants; *e. g.*, first, a joint covenant with A. and B., and next a separate covenant with A. and B., separately.

The rule as to covenantees may be illustrated by a comparison with the rule as to covenantors.

Covenantors may make themselves by the same covenant jointly as well as severally liable, but they can not by the same covenant give the covenatees joint as well as several rights of action. (*s*)

Thus X. and Y. may covenant with A., so as to enable A. on the same covenant to sue either X. and Y. jointly, or X. and Y. separately. But X. can not covenant with A. and B. so as to enable them to bring on the same covenant, at choice, either a joint action in the names of A. and B., or separate actions in the name of A. or of B.

The question which arises in most of the cases illus-

(*r*) Bradburn v. Botfield, 14 M. & W. 573, judgment of PARKE, B.

(*s*) Lush, Practice, 3rd ed., 222. Bradburn v. Botfield, 14 M. & W. 573, per PARKE, B. It is "fully established, I conceive, by [the] cases," says PARKE, B "that one and the same covenant can not be made both joint and several with the covenantees. It may be fit," he adds, "to observe that a part of Mr. Preston's explanation, that by express words a covenant may be joint and several with the covenantors or covenantees, notwithstanding the interests are several, is inaccurately expressed. It is true only of the covenantors."

trating this rule is not whether a covenant can be treated as at once joint and several, but whether a given covenant is to be considered as a joint covenant or a several covenant.

This question is one of "interpretation." In interpreting a covenant, regard must be had partly to the legal interests of the covenantees, partly to the language employed. The general principles of interpretation, or of the construction to be put upon a contract have thus been summed up:

"The construction of the contract . . . . depends primarily on the language used, but is a question of intention to be determined by considering, not only the language, but also the interests and relations of the parties. A contract will be construed to be joint [113] or several according to the interests of the parties, if the words are capable of that construction, or even not inconsistent with it. If the words are ambiguous it will be joint, if the interests are joint, and it will be several if the interest be several. On the other hand, if the words are unmistakeably joint, then, although the interest be several, all the parties must be joined in the action; if the words are unmistakeably several, the action must be several, though the interest be joint." (*t*) The interpretation, therefore, of covenants or other contracts is governed by the following rules:

1stly. Where the words of a covenant are unmistakeably joint or unmistakeably several; *i. e.*, where no ambiguity is possible, the covenant will be taken to be joint or several in each case, whatever be the interest of the parties; *i. e.*, all that will be looked to will be the language of the covenant; it will be merely a question of construction. (*u*)

2ndly. Whenever the words are ambiguous—*i. e.*, capable of two constructions—regard will be had to the legal interests of the covenantees. Where the interests

(*t*) Bullen, Pleadings, 3rd ed., 471, 472; Sorsbie v. Park, 12 M. & W. 154; Bradburn v. Botfield, 14 M. & W. 559.

(*u*) Keightley v. Watson, 3 Exch. 721, judgment of POLLOCK, C. B., and Ibid., 723, judgment of PARKE, B.

are several, the covenant will be held to be several; where joint, it will be held to be joint.

For, "it is impossible to say that the parties may not, if they please, use joint words so as to express a joint covenant, and thereby to exclude a several covenant, and that because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words capable of two constructions, we must look to the interest of the parties which they intended to express." (*z*)

"The same covenant can not be treated as joint or several at the option of the covenantee. If a covenant be so constructed as to be ambiguous,—that is, so as to serve either the one view or the other—then it will [114] be joint if the interest be joint; it will be several if the interest be several. On the other hand, if it be in its terms unmistakeably joint, then although the interest be several, all the parties must be joined in the action. So if the covenant be made clearly several, the action must be several, although the interest be joint." (*a*)

What is a joint and what a several interest? The best answer (*b*) appears to be, that the interest of parties to a contract is joint where a breach of it to one is necessarily a breach of it to all; several, where a breach of it to one is not necessarily a breach of it to all.

If X. covenant with A. and B. to pay a certain sum of money to B., the interest is joint, for the act to be done is one act, and the omission to pay the money to B. is a breach of contract to both the covenantees. (*c*) So where there is a covenant with two persons to pay them one annuity, the interest is joint, even though half the annuity is to be received by each. It would probably be otherwise if the covenant were to pay a separate annuity to each in which case the interest would be several. (*d*)

(*z*) Ibid., 723, per PARKE, B.

(*a*) Keightley v. Watson, 3 Exch. 721, per POLLOCK, C. B., conf. Lane v. Drinkwater, 1 C. M. & R. 612.

(*b*) See for this answer, Lush., Practice, 3rd ed., 22.

(*c*) Anderson v. Martindale, 1 East, 497.

(*d*) Lane v. Drinkwater, 2 D. P. C. 233.

Where, on the other hand, it was agreed by a ship's husband with the owners of the ship, that after her return a full account should be made of the said ship and her concerns, and the net profits be divided, after deducting all charges, it seems to have been held that each of the owners had a separate interest in the making out of the account by which his share was to be ascertained, before an actual division was made of the profits of the adventure. (*e*)

[115] If, again, a person demises Blackacre to A. and Whiteacre to B., and covenants with them and each of them that he is lawful owner of the said lands, their interests are separate. (*f*)

RULE 15.—The right to bring an action on contract can not be transferred or assigned. (*g*)[1]

(*e*) Owston v. Ogle, 13 East, 538, 540. Some writers of authority maintain that a covenant can be at once joint and several, not only as regards the covenantors, but also as regards the covenantees. On this view the question, whether a covenant is joint or several, or joint and several, as regards the covenantees, is wholly a question of construction *i. e.*, of the words of the covenant. This view of the law is thus stated,—

"If there be two or more covenantors, or two or more covenantees, the covenant may either be joint or several, or both joint and several. Thus, if there be two covenantors, they may bind themselves jointly, or may bind themselves severally, or may bind themselves both jointly and severally. And if there be two or more covenantees, the covenant may be entered into with them jointly or with them severally, or in both ways. When, however, a covenant is entered into with two or more, and with each of them, it will not be considered joint and several unless distinctly expressed as such by the deed itself; but will be deemed joint or several according as the interest of the covenantees in the subject-matter is joint or several." Davidson's Precedents, 3rd ed., 109.

The view taken in the text is that of various writers of reputation, *e.g.*, Bullen, Pleadings, 3rd ed., 471, and Lush, Practice, 3rd ed., 22. The apparent difference of view is possibly merely a difference of language. The covenant which one writer would call a joint and several covenant, would, perhaps, be termed by another two separate covenants. It is admitted on both sides that covenants are, as a rule, either joint or several, and not as regards the covenantees both joint and several.

(*f*) Anderson v. Martindale, 1 East, 501.

(*g*) This is merely an application to actions ex contractu of the general principle, that the right to bring an action can not be transferred. See Rule 6.

[1] See *ante*, note.

Though the interest in a contract is constantly transferred from one person to another, the right to sue upon a contract can not be transferred, so as to enable the transferee or assignee of the interest in the contract to sue for a breach thereof in his own name. He must sue in the name of the assignor; or, if he be dead, in the name of his executor or administrator. (*h*)

A debt is due from X. to A. A. can not transfer the debt to B. so as to enable B. to sue for it in B.'s [116] name. (*i*) (*k*)

It is at once a result and illustration of this rule, that no arrangement between the parties to a contract can give any one a right to sue for its breach who would not independently of the arrangement have any legal right to sue. (*l*) It is, however, possible for the several parties to a contract to agree among themselves that actions for breach of the contract shall be brought in the name of one of them only. With reference to an agreement of this kind it has been laid down as follows:—"We think that the members of a firm can not by agreement give an authority to any one of them to bring an action in his name against persons not members of the firm. But where several parties create by agreement penalties to be paid by one of them to the others, we see no objection to their empowering one to sue for the others. Such an agreement is in effect an undertaking not to object on account of all who ought otherwise to have been joined in the action not being joined." (*m*)

Where two persons have a joint right of action, *e. g.*, where A. and B. have a right of action against X., one can not assign to the other his share in the right of action so as to enable such assignee to sue alone. Where X. covenanted with A. and B., it was held that B. could not,

(*h*) Chit., Pleading, 7th ed., 17.

(*i*) Jones v. Carter, 15 L. J. 96, Q. B.; 8 Q. B. 134. See further, *ante*, as to the effect of assignment on the right of set-off.

(*k*) But see as to assignment of a debt by agreement between the assignor, debtor, and assignee, *post*.

(*l*) Hybart v. Parker, 4 C. B., N. S., 209; 27 L. J. 120, C. P.

(*m*) Radenhurst v. Bates, 3 Bing. 470, per CURIAM.

by resigning his rights to A., enable A. to sue alone for a breach of covenant. (*n*)

"The liability to be sued jointly by the two covenantees . . . might perhaps be sufficient to sustain the present action if it were not for the rule . . . which prohibits the assignment of the right to enforce [117] such a liability, inasmuch as the indenture of disclaimer sufficiently shows the intention on the part of [B.] and the plaintiff, that the plaintiff shall have the right to sue, which before the execution of that deed might have been exercised by the plaintiff and [B]. But there is no doubt that such a right is by law not assignable. The defendant, indeed, does in terms covenant with the plaintiff and [B], their executors, administrators, and assigns, but the rule which prohibits the assignment of a right to sue on a covenant is not one which can be dispensed with by the agreement of the parties, and it applies to covenants expressed to be with assigns as well as to others." (*o*)

Exception 1.—Contracts made assignable by statute. (*p*)

In the case of some kind of contracts an assignee is empowered by statute to sue upon them in his own name. Such are promissory notes, (*q*) bills of lading, (*r*) bail bonds, (*s*) replevin bonds, (*t*) administration bonds, (*u*) life and marine policies of insurance, (*x*) choses in action belonging to companies within the Companies Act, 1862. (*y*)

(*n*) Wetherell v. Langston, 1 Exch. 634.

(*o*) Wetherell v. Langston, 1 Exch. 644, 645, per CURIAM; but conf. Linwood v. Squire, 5 Ex. 235.

(*p*) By "assignable" is, of course, meant, in treating of the exceptions to the general rule, assignable so as to enable the assignee to sue in his own name.

(*q*) 4 Anne, c. 9, s. 1.

(*r*) 18 & 19 Vict. c. 111, s 1.

(*s*) 4 Anne, c. 16, s. 20.

(*t*) 11 Geo. II., c. 19, s. 23. But assignment of these bonds is not now necessary. See 19 & 20 Vict. c. 108, s. 63–66 and 70.

(*u*) 20 & 21 Vict. c. 77, s. 81, compared with 21 & 22 Vict. c. 95, s. 15. See Sandrey v. Michell, 3 B. & S. 405; 32 L. J. 100, Q. B.

(*x*) 30 & 31 Vict. c. 144; 31 & 32 Vict. c. 86.

(*y*) 25 & 26 Vict. c. 89, s. 157.

Exception 2.—Contracts or choses in action assignable by custom.

Such are bills of exchange, checks, &c.

Exception 3.—Assignment of a debt by agreement of all the parties.

"The assignment of a debt may be effected in [118] law so as to give a right of action to the assignee by means of a binding agreement between the assignor, the assignee, and the debtor, to the effect that the debt shall be discharged as against the assignor or original creditor, and a new liability created for the debt in favor of the assignee." (*a*)

Suppose X. owes M. £100, and M. owes A. £100, and the three meet, and it is agreed between them that X. shall pay A. the £100. M's debt is extinguished, and A. may recover the sum against X. (*b*)

In a sense, such a transaction involves the assignment of a chose in action, since the claim of M. against X. is transferred to A. But there is in reality no exception to the general rule; for A. sues X., not on the original contract between M. and X., but on a new contract between A. and X., the consideration for which is the extinction of A.'s claim against M., *i. e.*, of M's debt to A. There must, therefore, be an agreement between all the three parties. (*c*) The intermediate debt, *i. e.*, the debt due from M., the assignor, to A., the so-called assignee, must be extinguished. (*d*) For though where by an agreement between the three parties, A. undertakes to look to X., and not to M., his original debtor, A. may maintain an action against X. on this agreement, yet, in order to give A. the right to such an action, there must be an extinguishment of the intermediate debt, *i. e.*, the debt due from M. to A. (*e*) There must also, at the time of the

(*a*) Leake, Contracts, 607, 608.

(*b*) Tatlock v. Harris, 3 T. R. 180, per BULLER, J.

(*c*) Price v. Easton, 4 B. & Ad. 433.

(*d*) Cuxon v. Chadley, 3 B. & C. 591; Cochrane v. Green, 9 C. B., N. S., 448; 30 L. J. 97, C. P.

(*e*) Wharton v. Walker, 4 B. & C. 165, judgment of BAYLEY, J.

assignment, be a debt actually due to M., the assignor, from X., the ultimate debtor. (*f*) The whole transaction is in effect the making of a new contract, and the right of the assignee depends in reality, not upon the [119] assignment of the assignor's claim, but upon a new agreement entered into by all the three persons concerned in the transaction. (*g*)

Exception 4.—Covenants annexed to, or running with, estates in land. (*h*)

Covenants of a certain class which specially concern or touch the land may be annexed to estates in land, so that the benefit or the burden of the covenants passes to an assignee of the estate. These covenants are then said to run with the land. (*k*)

The peculiarity of covenants which run with the land is, that the benefit of them, or the obligation to perform them, passes from the person with or by whom they were made to the person interested in the estate to which they refer. The meaning of this is seen by comparing covenants which run with the land with covenants which do not pass or run with the things to which they refer.

Suppose X. sells goods to A., and covenants for a good title, and A. sells them again to B., A., or his representatives, can sue X., or his representatives, for a breach of the covenant; but B. can not sue X., or his representatives, for such a breach. B.'s only remedy (if any) against X. is an action in A.'s name. Suppose, again, that A. lets goods to X., and that X. covenants for himself and his assigns to return the goods at the end of the term in as good condition as they were let to him, and that X. then sells all his interest in the goods to Y., A.

(*f*) Fairlie v. Denton, 8 B. & C. 395.

(*g*) Wilson v. Coupland, 5 B. & Ald. 228; Hudson v. Bilton, 6 E. & B. 565; 26 L. J. 27, Q. B. Leake, Contracts, 609.

(*h*) See especially Leake, Contracts, 615–623; Smith, Landlord and Tenant, 282; and Spencer's Case, 1 Smith, L. C., 6th ed., 45.

(*k*) Leake, Contracts, 615. Contracts not under seal never run with the land. Bickford v. Parson, 5 C. B. 918; 17 C. J. 192, L. P.; Brydges v. Lewis, 3 Q. B. 603; Standen v. Chrismas, 10 Q. B. 135.

can, if the goods are not returned in a good condition, sue X. (or his representatives) for a breach of covenant, but he can not sue Y., or his representatives, for such breach. (*m*) In these and the like instances [120] the contract is looked upon as purely personal. It benefits the person with whom it is made, or his representatives, and binds the contractor, or his representatives; but it neither benefits nor binds the person to whom the property to which the covenant relates passes.

But, suppose that X. sells land to A., and covenants for title, and that A. sells the land again to B., B. will have a right of action against X., or his representatives, for a breach of X.'s covenant. Suppose, again, that A. leases land to X., and that X. covenants to repair, and afterwards assigns his term to Y., who breaks the covenant, A. has a right of action against Y. (*n*) These covenants, therefore, run with the land.

Covenants affecting land, when made between persons who do not stand in the relation of lessor and lessee, are governed wholly by the common law, and are covenants either by the owner of land, *i. e.*, imposing a burden upon him, or covenants with the owner of land, *i. e.*, conferring a benefit upon him.

Covenants by owners of land do not run with the land; *i. e.*, the burden of such covenants does not pass with the estate to the assignee. (*o*) If (that is to say), X., on purchasing an estate, were to covenant as owner with the vendor, *e. g.*, that the land should never be built upon, such a covenant would not bind the successive owners of the estate, *i. e.*, would not run with the land.

(*m*) Spencer's Case, 1 Smith, L. C., 6th ed., 47; Splidt v. Bowles, 10 East, 279; Gorton v. Gregory, 3 B. & S. 90; 31 L. J. 302, Q. B.

(*n*) Though he still retains a right of action against X. for a breach of his covenants. Wadham v. Marlow, 8 East, 314, n.; Walker's Case, 2 Coke, 21; 1 Wms. Saund. 240, 241; 2 Ibid, 302, note 5.

(*o*) 1 Smith, L. C., 6th ed., 63–77; Keppel v. Bailey, 2 M. & K. 517. *In re* Drew's Estate, L. R. 2, Ex. 206; 35 L. J. 845, Ch.; Richards v. Harper, L. R. 1, Ex. 199, 205. Though the weight of authority is in favor of the view of the law expressed in the text, Lord St. Leonards has expressed a decided opinion that covenants by the owners of land may run with the land. The question whether such covenants may not run with the land must, therefore, be considered doubtful. See Sugden, Vendors and Purchasers, 14th ed., 453, 585, 593

[121] Covenants with owners, *i. e.*, for the benefit of owners of land (provided, of course, that they are of a nature to run with the land), pass to each successive assignee of the land, *i. e.*, from owner to owner. Thus, suppose any one covenant (*p*) with the owner of land to supply pure water for cattle on the land, such a covenant will run with the land, *e. g.*, if owner A. sell his land to B., B. has a right to the benefit of the covenant, and may sue for a breach of it.

Covenants which affect land may be made between persons who stand in the relation of lessor and lessee.

The rules as to such covenants depend partly on the common law, and partly on the statute 32 Hen. VIII. c. 34.

At common law, lessor and lessee were each bound by their covenants to each other, and if the covenants "touched the land,"—*e. g.*, were covenants for title, covenants to repair, and so forth,—the assignee of the lessee could sue the lessor, and could, on the other hand, be sued by the lessor. If, for example, A. leased land to B., covenanting for renewal, and B. assigned the lease to C., C. could sue A. for any breach of covenant, and, on the other hand, if B. had covenanted to repair, A. could sue C. for a breach of such covenant on C.'s part.

But at common law, covenants, though touching the land, neither bound nor benefitted the assignee of the lessor. Suppose A. leased to B., and covenanted for renewal, (*q*) whilst B. covenanted to repair, and A. then assigned his estate in the land to C., B. could not sue C. for the breach of the one covenant, nor C. sue B. for the breach of the other.

The original parties to the lease, and their representatives, might, it is true, sue one another, *i. e.*, B. might sue A., or A.'s personal representatives, and A. [122] might sue B., or B.'s personal representatives. The result was, that the person who had the right

(*p*) Sharp v. Waterhouse, 7 E. &. B. 816 ; 27 L. J. 70, Q. B.

(*q*) See Roe d. Bamford v. Hayley, 12 East, 468, per ELLENBOROUGH, C. J

to sue, or the liability to be sued, was not the person interested in the land. (*e*)

The statute 32 Hen. VIII. c. 34 (in order to remedy this defect of the common law), gave the assignee of the reversion the same remedy against the lessee and his assignee (*f*) as the original landlord would have had against the original tenant, and the original tenant and his assignees the same remedy against the reversioner and his assignees as such tenant would have had against the original landlord. (*g*) Thus, A. leases to B., and then assigns his reversion to C.; C. can under the statute be sued by, and sue B. on all covenants which touch the land, and further, if B. assigns to D., C. can be sued by, and can sue, D.

An assignee, in order to obtain the benefit, or incur the burdens, of covenants which run with the [123] land, must take the same estate as that to which the covenants are annexed. Thus, though the covenants pass to an assignee of a lessee, they do not pass to the under-lessee of the lessee. (*h*) If A. leases to B. for twenty

(*e*) Smith, Landlord and Tenant, 283.

(*f*) The term "assignee" has, under 32 Hen. VIII. 3, 34, received a very extended interpretation.

It includes, for instance, a grantee, or devisee, or heir; or if the reversion is a term of years, the executor or administrator of the reversioner (Derisley v. Custance, 4 T. R. 75. Leake, Contracts, 625); the executor or administrator of an assignee (Spencer's Case, 1 Smith, L. C., 6th ed., 49); the assignee of an assignee, or the assignee of the executor or administrator of an assignee (Spencer's Case, 1 Smith, L. C., 6th ed., 49); the trustee in bankruptcy; the remainderman under a lease made under a power (Isherwood v. Oldknow, 3 M. & S. 382); the assignee of part of the reversion, *e. g.*, for years (Coke, 1 Inst. 215 a.; Wright v. Burroughes, 3 C. B. 685 (Ex. Ch.)); the assignee of the reversion in part of the premises as far as the covenants affect his part of the land (Twynam v. Pickard, 2 B. & Ald. 105); the assignee of the term in part of the demised premises,—*i. e.*, the assignee of part of the premises from the lessee (Palmer v. Edwards, 1 Doug. 183. See Norval v. Pascoe, 34 L. J. 82, Ch. See especially, Twynam v. Pickard, 2 B. & Ald. 110, 111, as to the meaning of assignee being the same in both sections of the Act); a mortgagee (Williams v. Bosanquet, 1 B. & B. 238); the grantee of the reversion in copyhold lands (Glover v. Cope, 3 Lev. 326); and generally persons who, though they be not strictly assignees of a reversion, virtually stand in that position (Martyn v. Williams, 1 H. & N. 817; 26 L. J. 117, Ex.).

(*g*) Smith, Landlord and Tenant, 285.

(*h*) See 8 & 9 Vict. c. 106, s. 9, by which, when the reversion on a lease is gone, the next estate is deemed a reversion for the purpose of preserving the

years, and B. assigns his lease to C., C. is bound by B.'s covenants (if they touch the land), with A. But suppose B. underlets to C.,—*e. g.*, for nineteen years,—C. is not bound by B.'s covenants with A., (*i*) nor can C. take the benefit of covenants by A. with B.

Covenants which run with the land must have the following characteristics:

1st. Such covenants must be made with a covenantee who has an interest in the land to which they refer. (*k*)

Suppose that A. is owner of Blackacre, and X. covenants with A. to keep certain buildings on Blackacre in repair, such a covenant runs with the land; *i. e.*, passes to the successive assignees of Blackacre,—*e. g.*, persons who purchase it. Suppose, on the other hand, A. is not owner of Blackacre, but that it belongs to B., and X. covenants with A. as in the former case. Such a covenant does not run with the land. Neither B. nor the assignees of B. can sue upon it, and an action for its breach must be brought, if at all, by A., or the representatives of A.

A mortgagor and a mortagee joined in a lease of the mortgaged premises, and the covenants by the lessee were made with the mortgagor only. It was held that the assignee of the mortgagee, who, it must be remembered, had the legal (*l*) interest in the land, could not sue [124] upon them; (*m*) but that the action must be brought by the mortgagor, (*n*) or his representatives. For the same reason, where a lease was made by a mortgagor, in which a previous mortgage was recited, the covenants were held not to be assignable; that is, being covenants with the mortgagor, who had no legal interest in the land, they were not covenants annexed to the land, or running with it. (*o*)

incidents and obligations attaching to such reversion. As to the liability of assignor and lessee, and the effect of assignment, see Chapter XI.

(*i*) Molford v. Hatch, 1 Doug. 183; Earl of Derby v. Taylor, 1 East, 502.

(*k*) Spencer's Case, 1 Smith, L. C., 6th ed., 50.

(*l*) See Rule 4.

(*m*) Webb v. Russell, 3 T. R. 393.

(*n*) Stokes v. Russell, 3 T. R. 678.

(*o*) Pargeter v. Harris, 7 Q. B. 708.

Though the covenantee must have an interest in the land, the covenantor need not have any. (*p*) Thus, a covenant by X. with A., the owner of Blackacre, to keep in repair certain buildings thereon, will run with the land, that is, pass to the successive owners of it, even though X. has no interest in the land whatever.

2ndly. Such covenants must concern or "touch" the land.

It is not every covenant with the owner of land which runs with the land. Suppose, for example, A. is the owner of land which he has bought from X. and X. has entered into two covenants with him; the one for title, and the other to repay certain money beyond the purchase money for the land, advanced him by A. The first covenant affects or touches the land, and therefore, if A. sells the land to B., the covenant runs with the land; *i. e.*, B., the assignee, acquires a right to sue X. for its breach.

The second covenant is one only affecting A. personally. It in no way touches or concerns A.'s estate in the land. It is what is called a covenant in gross, or, as it is sometimes termed, a collateral covenant. It therefore does not run with the land, nor can B. sue X. for its breach. (*q*)

A covenant which touches the land, as con- [125] trasted with a collateral covenant, is one which affects the nature, quality, or value of the land, or rather of the estate in the land, or the mode of enjoying it. (*r*)

"In order to bind the assignee, the covenant must either affect the land during the term, such as th se which regard the mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land at the end of the term. Covenants to restrain the exercise of particular trades in houses fall within the first class; they affect the mode in which the property is to be enjoyed during the term. The

(*p*) Spencer's Case, 1 Smith, L. C., 6th ed., 63.

(*q*) The same principle applies where the relation of lessor and lessee exists, and it has been long held that the statute (32 Hen. VIII. c. 34) does not apply to costs which do not touch or concern the land. Smith's Landlord and Tenant, 286, and Spencer's Case, Smith, L. C., 6th ed., 51.

(*r*) Mayor of Congleton v. Pattison, 10 East, 135–137.

case of Bally v. Wells (*s*) may rank under the second class, for if the lessee or a stranger were in the actual occupation of the tithes during the term, the evidence of the lessor's right to them would be continued; and therefore the estate of the reversioner would be better at the end of the term." (*t*)

Though the general distinction between covenants which touch the land and covenants which do not touch the land, or collateral covenants, is clearly marked, it is often a question under which head a given covenant falls. Thus in a case already referred to, (*u*) a covenant by a lessee of tithes not to let any of the farmers of the parish have any part of the tithes, was held to run with the tithes, because it affected the estate. A covenant, on the other hand, by the lessee of land, on which he was to erect a mill, not to hire persons to work at the mill who belonged to another parish, was held not to touch the thing demised, as not affecting the land itself or the mode [126] of occupying it. (*w*) A covenant to leave land at the end of the term stocked with game has been held to touch the land, (*x*) since "no covenant more closely touches or concerns the land than a covenant to keep on the land a certain quantity of game. In order to keep up the game, some one must be always on the land, and the observance of the covenant can be a benefit to no one but the owner of the land; it is more intimately connected with the land than a covenant to reside, which has been held to run with the land." (*y*) "It is a covenant which affects the value of an estate, and is valuable to the owner on that ground. It affects the enjoyment of the estate; it relates to a matter to be done on the land, and touches the

(*s*) 3 Wils. 25.

(*t*) Mayor of Congleton v. Pattison, 10 East, 137, 138, judgment of BAYLEY, J. The expressions here used apply directly to cases where the relation of lessor and lessee exists. But they apply equally in principle to covenants with the owner of land by a person not a lessee. This remark applies to other quotations.

(*u*) Bally v. Wells, 3 Wils. 25.

(*w*) Mayor of Congleton v. Pattison, 10 East, 130.

(*x*) Hooper v. Clark, L. R. 2, Q. B. 200; 36 L. J. 79, Q. B.

(*y*) Ibid., 203, judgment of BLACKBURN, J.

thing demised;" (*z*) and is on these grounds distinguished from a covenant to re-deliver sheep or cattle which have been hired, in a good condition, which being a covenant relating to goods only, does not run with the land. (*a*)

A proviso in a lease for re-entry in case the lessee, or any tenant, or occupier of the premises demised, should be lawfully convicted of any offense against the game laws, has been held, though with some hesitation, not to touch the land (*b*) on the ground that it seems "to be purely collateral." "The question," it was said in this case, "appears to be this—Does the condition touch the thing demised? If it does not, it matters nothing that it touches the personal character of the occupier. Now here the act done had no reference whatever to the land demised, but only to the conduct of the person who happened to be in occupation of the premises. But . . . the mere circumstance of the offense being committed by the person in occupation does not refer enough to the land itself to enable the assignee of the landlord to enforce a forfeiture for the breach of this condition. [127] No case has gone to such a length, and the reason of the thing seems to be adverse to the plaintiff's contention." (*c*)

The agreement to keep the land stocked with game (*d*) touched the land because it affected the enjoyment of the estate; the agreement for re-entry in case the occupier was convicted of an offense against the game laws (*e*) was held not to touch the land, because it did not affect the enjoyment or value of the estate, but had simply reference to the conduct of the lessee or occupier. (*f*)

(*z*) Ibid., 202, judgment of COCKBURN, C. J.
(*a*) Spencer's Case, 1 Smith, L. C., 6th ed., 47.
(*b*) Stevens v. Copp, L. R. 4, Ex. 20.
(*c*) Stevens v. Copp, L. R. 4, Ex. 26, judgment of CLEASBY, B.
(*d*) Hooper v. Clark, L. R. 2, Q. B. 200; 36 L. J. 79, Q. B.
(*e*) Stevens v. Copp, L. R. 4, Ex. 20.
(*f*) The following are examples of covenants which touch the land, viz:—Covenants to pay rent (Smith, Landlord and Tenant, 287); to repair (Spencer's Case, 1 Smith, L. C., 6th ed., 45; Windsor's Case, 5 Coke, 24); for quiet enjoyment (Campbell v. Lewis, 3 B. & Ald. 292); for cultivation of land in par

Covenants may run with, or be annexed to, different estates in land.

The benefit, though not the burden, of such covenants can be annexed to the fee. (*g*)

[128] The benefit and the burden of such covenants can be annexed both to the term and to the reversion, and such covenants can also be annexed to incorporeal hereditaments. Thus a covenant in a lease of tithes was held to run with the lease of the tithes, and bind the assignee. (*h*) So a covenant in a lease of tolls will run with the tolls demised by the lease; (*i*) and can be annexed to the grant of a license, *e. g.*, to dig for minerals. (*k*)

But a covenant can not be annexed to an equitable estate, (*l*) or to a mere rent issuing out of land. (*m*)

Exception 5.—Assignment by marriage, (*n*) bankruptcy, (*o*) and death. (*p*)

ticular manner (Cockson v. Cock, Cro. Jac. 125); for renewal (Roe d. Bamford v. Hayley, 12 East, 464; Williams v. Earl, L. R. 3, Q. B. 739); not to carry on particular trade (Hodgson v. Coppard, 30 L. J. 20, Ch.); to keep up sea-walls (Morland v. Cook, L. R. 6 Eq. 652); to leave land stocked with game (Hooper v. Clark, L. R. 2, Q. B. 200); to supply premises with water (Jourdaine v. Wilson, 4 B. & Ald. 266); to supply water for cattle on land (Sharp v. Waterhouse, 7 E. & B. 816; 27 L. J. 70, Q. B.).

The following are examples of covenants which do not touch the land, viz: —Covenants as to mere utensils used on land (Williams v. Earl, L. R. 3, Q. B. 739; 37 L. J. 231, Q. B.) for re-entry in case lessee is convicted of offense against game laws (Stevens v. Copp, L. R. 4, Ex. 20); not to employ laborers out of other parishes (Mayor of Congleton v. Pattison, 10 East, 130). See further as to distinction between covenants having reference to something which is in existence at the time, and covenants which refer to something which is not in existence (Spencer's Case, 1 Smith, L. C., 6th ed., 46; Easterby v. Sampson, 9 B. & C. 505; Wilson v. Hart, L. R. 1, Ch. 463; 36 L. J. 569, Ch. Minshull v. Oakes, 2 H. & N. 793; 27 L. J. 194, Ex.).

(*g*) See *ante*.

(*h*) Bally v. Wells, 3 Wils. 25.

(*i*) Earl of Egremont v. Keene, 2 Jones (Exch. Ireland), 307.

(*k*) Martyn v. Williams, 1 H. & N. 817; 26 L. J. 117, Ex.; Muskett v. Hill, 5 B. N. C. 694, 708.

(*l*) Pargeter v. Harris, 7 Q. B. 708.

(*m*) Milnes v. Branch, 5 M. & S. 411; and see Williams v. Hayward, 1 E. & E. 1040; 28 L. J. 374, Q. B.; Leake, Contracts, 623, 624.

(*n*) Chapter VIII.

(*o*) Chapter IX.

(*p*) Chapter X.

RULE 16.—The right of action on a contract made with several persons jointly passes on the death of each to the survivors, and on the death of the last to his representatives.[1]

A contract is made with A., B., and C. The right to sue upon the contract passes on the death of C., to A. and B.; on the subsequent death of B., to A.; and on the death of A. (provided the right to sue survives,) (*q*) to A.'s executor or administrator. The representatives, *e. g.*, of C. can neither sue upon the contract themselves nor join in suing with A. and B.

Exception.—Covenants with tenants in common.

If there is a joint demise by A. and B., who are tenants in common, and a covenant therein with them, *e. g.*, to repair, an action for the breach of such a [129] covenant must, on the death of B., be brought, not by A., but by A. and M., the representatives of B. (*r*

This exception is only an apparent one, for A. and M sue in the character, not of joint covenantees, but of joint owners of the reversion.

(*q*) Ibid.

(*r*) Foley v. Addenbrooke, 7 Q. B. 197; Thompson v. Hakewill, 19 C. B. N. S., 713; 35 L. J. 18, C. P. Leake, Contracts, 628.

[1] Beebee v. Miller, Minor (Ala.) 364; Callison v. Little, 2 Port. 89; Freeman v. Curran, 1 Minn. 169.

CHAPTER V.

PRINCIPAL AND AGENT.

RULE 17.—A contract entered into with a principal (*a*) through an agent is in law made with the principal, and the principal, not the agent, is the proper person to sue for the breach of it. (*b*)

A person can sue on any contract made on his behalf, whether made by an agent authorized to act for him at the time, (*c*) or made without his authority, or even without his knowledge, but subsequently ratified by himself. (*d*) [1]

(*a*) A principal is "a person who being competent to do any act for his own benefit or on his own account, employs another person to do it."

An agent is "the person so employed."

Agency is "the relation created between the parties."

Authority is "the power delegated by the principal to the agent."

The principal is, under different circumstances, termed an "employer," "master," &c., according to the nature of the agency.

The agent is termed the "employed," "servant," "factor," "broker," &c.; but whatever the nature of the agency, the above definitions apply to it (Story, Agency, s. 3).

(*b*) Story, Agency, ss. 418, 419; Broom, Maxims, 784, 785, 4th ed.

(*c*) Watson v. Swann, 11 C. B., N. S., 756; 31 L. J. 210, C. P.; Story, Agency, ss. 391, 413.

(*d*) Ancona v. Marks, 7 H. & N, 686; 31 L. J. 163, Ex.

[1] Graham v. Duckwell, 8 Bush. 12; Woodruff v. M'Gehee, 30 Ga. 158; Foster v. Smith, 2 Cold. (Tenn.) 744; Barry v. Page, 10 Gray (Mass.) 398. Otherwise when principal is a foreigner. § 793. But the states of the American Union are not in this sense foreign to each other. Taintor v. Prendergrast, 3 Hill, 72. In Barry v. Page (10 Gray, 788), says BIGELOW, J., "It has been sometimes said that when a sale is made by a factor for a foreign principal, the latter can not sue for the price. This supposed exception has been put on the ground that in such case the presumption at law is that exclusive credit was given to the agent, and therefore the principal can not be treated in any

A principal's right to sue on a contract authorized by him at the time of its making arises immediately from the nature of a contract made by means of an agent. Such an agreement, though made through the intervention of an agent, is as much an agreement between the parties as if it had been made between them directly.

A contract that is with P., (*e*) made by means of A., [131]

(*e*) Throughout this and the other chapters on agency (Chapters XII., XX., XXVI.), whenever letters are employed in describing the parties to any transaction, P. is used for the principal, or alleged principal, A. for the agent of such principal, and T. for the third or other party to the contract or transaction.

manner whatever as a party to the contract. But the later and better opinion is that there is no such absolute presumption, and that a principal, whether foreign or domestic, may sue to recover the price of goods sold by his factor, unless it is made affirmatively to appear that exclusive credit was given to the agent, by proof other than the mere fact that the principal resided in another state or country." "So far as concerns the precise point ruled," says Wharton (on Agency and Agents, § 799), "the case is authority only for the position that a principal is not, in the United States, precluded from suing a vendee by the fact that he is domiciled in a state other than that to which the contract of sale is subject. On the general question of the right of a foreign principal to sue, the English courts do not now (1875) recognize the qualifications stated by Judge Bigelow." And see Leverick v. Meigs, 1 Cow. 648; Weed v. Railroad Co., 19 Wend. 534. But where the principal is not disclosed, and the agent contracts as for himself, the principal can only claim subject to equities applicable to the agent, for it is the principal's fault that the agent is permitted thus to contract without restriction; and he can not complain if a third party, dealing with the agent under the impression that the agent was principal, should make his own claims against the agent a reason for his contracting with the agent; Lock's appeal, 72 Penn. St. 491; Miller v. Lea, 35 Md. 396; Conklin v. Leeds, 58 Ill. 178; Koch v. Willi, 63 Id. 144; Leeds v. Ins. Co., 6 Wheat. 565; Traub v. Milliken, 57 Me. 63; Culver v. Bigelow, 43 Vt. 249; Lime Rock Bk. v. Plimpton, 17 Pick. 159; Kingsley v. Davis, 104 Mass. 178; but a person who contracts with an agent knowing him to be only an agent, but not knowing whose agent he is, can not, in an action brought by the principal, avail himself of a defense good against the agent. Wharton on Agency and Agents, § 405.

is as much a contract with P. made by T., the other party to it, as if it had been made with P. by T. through the means, not of A., but of a letter. (*f*) Hence, for example, on the sale of goods by a shopman, the contract to pay is manifestly not with the shopman, but with his master, who is obviously the person to sue for the price of the goods. As an agent is, as long as he acts merely as an agent, simply the means of communication between the contracting parties, infants or married women, who are incapable of contracting for themselves, are not capable of contracting as agents on behalf of others.

A principal's right to sue on a contract which he has ratified depends on the principle that ratification has a retrospective effect, and is equivalent to a prior command.

If "[A.], unauthorized by me, makes a contract on my behalf with [T.], which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. [T.] entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, [T.] is precisely in the position in which he meant to be; or, if he did not believe [A.] to be acting for me, his condition is not altered by my adoption of the agency, for he may sue [A.] as principal at his option, and has the same equities against me if I sue which he would have had against [A.]." (*g*)

A principal may sue on a contract ratified by him after action brought, (*h*) but his right to sue on the ground of ratification is subject to the following qualifications:

[132] First. The contract must at the time of its making be professedly (*i*) made on behalf of the plaintiff. For "it is clear law that no one can sue upon a contract unless it has been made by him or by an agent professing to act for him, and has been ratified by him;" (*k*)

(*f*) See Story, Agency, s. 391.

(*g*) Bird v. Brown, 4 Exch. 786, 798. See Leake, Contracts, 268.

(*h*) Ancona v. Marks, 7 H. & N. 686; 31 L. J. 163, Ex.

(*i*) Saunderson v. Griffiths, 5 B. & C. 915, judgment of Holroyd, J., Vere v. Ashby, 10 B. & C. 288, 398.

(*k*) Watson v. Swann, 11 C. B., N. S., 769, judgment of Erle, C. J.

and it seems essential that the agent should not only intend but also profess to act on behalf of the person who subsequently ratifies, since "the rule as to ratification applies only to the acts of one who professes to act as the agent of the person who afterwards ratifies." (*l*) Thus, where A., a broker, having effected a general policy with T. on goods "to be valued and declared as interest might appear," and having, afterwards, received an order from P. to insure goods for him, indorsed a declaration of P.'s goods on the policy, it was held that P. could not sue on the policy, because it had not been made with P., nor on P.'s behalf, and was not intended, at the time it was made, to be a contract with P. (*m*)

Secondly. The contract must be made with a person capable of being ascertained at the time when the contract is made. (*n*)

A contract, therefore, can not be ratified by a person not in existence at the time the contract is made. (*o*)

But, though "the law obviously requires that the person for whom the agent professes to act must be a person capable of being ascertained at the time, it is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract." (*p*) Thus, a ratification may be valid where the agent professes to act for persons filling a certain [133] character, although the actual persons are not then ascertained, or are unknown to him. (*q*) A. entered into a contract with T. on behalf of an intestate's estate. After the contract was made, P. took out letters of administration. It was held that P. might sue T. upon the contract, for "the sale was made by a person who intended to act as an agent for the person, whoever he might happen to

(*l*) Vere v. Ashby, 10 B. & C. 298, per PARKE, B.

(*m*) Watson v. Swann, 11 C. B., N. S., 756; 31 L. J. 210, C. P.

(*n*) Ibid., 11 C. B., N. S., 771, judgment of WILLES, J.

(*o*) See Kelner v. Baxter, L. R. 2, C. P. 174, 186. See as to companies not being liable for acts of promoters, 1 Lindley, Partnership, 2nd ed., 400.

(*p*) Watson v. Swann, 11 C. B., N. S., 771, per WILLES, J

(*q*) Foster v. Bates, 12 M. & W. 226.

be, who legally represented the intestate's estate, and it was ratified by the plaintiff after he became administrator; and when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command. Nor is it any objection that the intended principal was unknown at the time to the person who intended to be the agent." (*r*)

Thirdly. The contract sued upon must be ratified wholly, if at all. It can not be ratified in part. (*s*)

Fourthly. The ratification must not put the third party—*i. e.*, the defendant—in a worse position than he was in at the time of making the contract. (*t*)

The contract not being with the agent, he can not sue upon it. He is, in fact, a mere instrument through whom the contract between the parties to it is effected. Thus, if a sale is made by a clerk, shopman, or other servant, he has no right to sue for the price of the goods. (*u*) Where a mere agent sues another mere agent, the action must fail, through want of privity between the parties; *i. e.*, from want of there being, as between them, any contract whatever. (*x*)

[134] Some difficulty arises in applying the law to actions against carriers for non-delivery. The difficulty consists in determining whether the consignor acts on his own behalf or as agent for the consignee. (*y*)

The exceptions to the rule under consideration are of two kinds. They are either cases in which the agent must sue and the principal can not sue, or else cases in which either the principal or the agent may sue.

(*r*) Ibid., 233, per CURIAM. See Tharpe v. Stallward, 5 M. & G. 760; 12 L. J. 251, C. P.; Watson v. Swann, 11 C. B., N. S. 756, 769; 31 L. J. 210, 213, C. P. Leake, Contracts, 269; and compare 2 Arnould, Marine Insurance, 3rd ed., 1033.

(*s*) Compare Ferguson v. Carrington, 9 B. & C. 59; Foster v. Smith, 18 C. B. 156. Smith, Master and Servant, 2nd ed., 156, 157.

(*t*) Bird v. Brown, 4 Exch. 786, 798.

(*u*) Story, Agency, s. 361. Williams v. Millington, 1 H. Bl. 81.

(*x*) Depperman v. Hubbersty, 17 Q. B. 767; Coombs v. Bristol and Exeter Rail. Co., 3 H. & N. 1; 27 L. J. 269, Ex.; Hurley v. Baker, 16 M. & W. 26; 16 L. J. 273, Ex.

(*y*) See *ante*.

Of the seven following exceptions, the three first are cases in which the agent must sue and the principal can not sue; the four last are cases in which either the principal or the agent may sue.

Exception 1.—Where an agent is contracted with by deed in his own name. (*z*)

If an agent, though in reality signing as agent for a principal, execute a deed in his own name, he is the only person who can sue upon the instrument; and this is so even though it be expressed to be made "between A. as agent of T. of the one part, and T. of the other." For if the covenants are with P. he can not sue, as not being a party to the indenture, (*a*) and if the covenants are with A. he is clearly the only person to sue for their breach. (*b*)

Exception 2.—Where the agent is named as a party to a bill of exchange, &c.

No person can claim upon a bill of exchange or promissory note except the parties named in the instrument. Hence, though the party entitled upon such instrument be an agent, the action must be brought in his name, and can not be brought in the name of the [135] principal, who is not a party. (*c*)

This exception would appear to be of small importance, since the right to sue on a bill of exchange, &c., is assignable. (*d*) When, therefore, an agent is named as party to a bill of exchange, &c., he can transfer the right to the principal by assigning to him the bill.

(*z*) Priestly v. Fernie, 34 L. J. 172, Ex.; 3 H. & C. 977; Schack v. Anthony, 1 M. & S. 573. Compare Appleton v. Binks, 5 East, 148. See Rule 12.

(*a*) Berkeley v. Hardy, 5 B. & C. 355. See *ante*.

(*b*) Wilks v. Back, 2 East, 142. There is, however, nothing to prevent P. executing a deed by means of A.

(*c*) Leake, Contracts, 302.

(*d*) Rule 15, Exception 2. Compare 1 Lindley, Partnership, 2nd ed., 473, 474.

Exception 3.—Where the right to sue on a contract is by the terms or circumstances of it expressly restricted to the agent.

Though A. is acting as agent of P., either T. may decline expressly to contract with any other than A., or else it may be manifest from the circumstances of the contract that T. contracted with A., and with A. only. In this case, although A. may have been, as a matter of fact, acting as agent for P., and though P. may have rights as against A., yet P., with whom T. never contracted, can not sue T., and A., who is the only person with whom he did contract, is the only person who can sue T. Thus, where a contract was made with A., one of several partners, in his individual capacity, and he at the time declared that he alone was interested in it, it was held that the other partners, although they might be interested in it, could not sue upon it; (*e*) for though the partner might, as regards his fellow-partners, act as their agent, yet "if one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made." (*f*)

If T. contracts with A. in consideration of the known personal capabilities of A., he can not be made liable to P., for whom A. was acting as agent. (*g*)

A. executed a charter-party, in which he was [136] described as owner of the ship; it was held that evidence was not admissible to show that P. was the real owner of the ship, in order to entitle him to sue upon the charter-party. (*h*)

This exception contains the principle which governs all the exceptional cases in which an agent can sue for a breach of contract, and a principal can not. The reason of this peculiarity always is, that the other contracting

(*e*) Lucas v. De la Cour, 1 M. & S. 249.
(*f*) Ibid., 250, per ELLENBOROUGH, C. J.
(*g*) Robson v. Drummond, 3 B. & Ad. 303.
(*h*) Humble v. Hunter, 12 Q. B. 310; 17 L. J. 350, Q. B.

party has contracted with the agent alone. That the contract was made with him alone may appear by the form of the contract itself (*e. g.*, where it is by deed), or may be proved from the circumstances of the case. But the reason why the agent alone can sue will be found to be in every instance the same, viz., that as between him and the other party to the contract, he has contracted not as an agent, but as sole principal.

Exception 4.—Where the contract is made with the agent himself; *i. e.*, where the agent is treated as the actual party with whom the contract is made.

"If an agent makes a contract in his own name, the principal may sue and be sued upon it, for it is a general rule that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made [*i. e.*, the agent], or in the name of the person with whom in point of law it was made [*i. e.*, the principal.]" (*i*) The agent can sue because he has been treated by the other party as the party to the contract. The principal can sue because he is the person really interested in the contract, for whose benefit it is made, and with whom the law considers it to be made; (*k*) for though a person who has expressly contracted with A. can not treat the contract as not being with A., on the ground that another person, P., is really in- [137] terested, yet when a contract is made expressly with A., either by word of mouth or in writing (provided the written instrument be not a deed), it is allowable for P., the person really interested, to show that the contract is, though on the face of it with A., yet in reality with him, and that he, therefore, has a right to sue upon it.

"Where an agent makes a contract, stating who his principal is, the principal, and not the agent, is the person

(*i*) Cothay v. Fennell, 10 B. & C. 671, 672, per CURIAM.

(*k*) This case differs from those included under Exception 3, since, in those, the agent was treated not only as a party, but as the only party to the contract,

generally the party to the contract, if the agent have the authority he alleges. But on the other hand, an agent may, and often does, make himself personally a party to the contract, if the form of the contract be such as to amount to saying, 'Although I am an agent only, nevertheless I contract for myself;' and although the principal may in some cases take advantage of such a contract, the agent, being the contracting party, is clearly liable, and can therefore sue upon it." (*l*)

Nor does it appear to make any substantial difference whether the contract is in writing or by word of mouth. The only difference seems to be "that if the contract is by word of mouth, it is not possible to say from the agent using the words 'I' and 'me' that he means himself personally; whereas, if the contract is in writing signed by his own name, in speaking of himself as contracting, the natural meaning of the words, is, that he binds himself personally, and he is taken to do so, and then the other party is bound to him." (*m*)

An agent was employed by a corporation as auctioneer to let land belonging to the corporation, and was known to be acting in this capacity, yet he was held entitled to bring an action in his own name for the hire of the land, (*n*) and the decision was thus explained by BLACKBURN, J.:—

"The plaintiff says, 'I, as auctioneer, that is, as [138] agent, let the land, and I contract that on the price being paid to me, the person paying the price shall have the enjoyment of the land.' The agreement was not reduced to writing, but that is the effect of the conditions, of the auction, and what took place at the auction. It may be that it was known that the plaintiff was not acting for himself, not under the directions of the race or some other committee, but that is immaterial for the present purpose, if a contract be made with the agent notwithstanding he is known to be an agent. There

(*l*) Fisher v. Marsh, 34 L. J. 178, Q. B., per BLACKBURN, J.
(*m*) Williamson v. Barton, 7 H. & N. 907, per BRAMWELL, B.
(*n*) Fisher v. Marsh, 34 L. J. 177, Q. B.; 6 B. & S. 411.

were numerous reasons why the contract should be made by and with the plaintiff himself, and at all events there was evidence for the jury that the contract was made with him." (*o*)

"The rule of law that the agent who makes the contract may bring an action on the contract in respect of his privity, and the principal in respect of his interest," (*p*) or, in other words, that where an agent is made a party to a contract, either the principal or the agent may sue for a breach of it, includes within it several cases which are sometimes reckoned separate exceptions to the general rule. (*q*) Under this head might be brought the following exception, which is more conveniently treated as a separate exceptional case.

Exception 5.—Where the agent is the only known or ostensible principal, or where the agent has made a contract not under seal in his own name for an undisclosed principal. (*r*)

"It is a well-established rule of law that where a contract not under seal is made by an agent in his own name for an undisclosed principal, (*s*) either the [139] agent or the principal may sue on it. The defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. The rule

(*o*) Fisher v. Marsh, 34 L. J. 178, Q. B., judgment of BLACKBURN, J. Contrast Evans v. Evans, 3 A. & E. 132; and compare Higgins v. Senior, 8 M. & W. 834; 11 L. J. 199, Ex.

(*p*) Sykes v. Giles, 5 M. & W. 650, per ABINGER, C. B.

(*q*) Offley v. Ward, 1 Lev. 235; Joseph v. Knox, 3 Camp. 320; Piggott v. Thompson, 3 B. & P. 129. Hagedorn v. Oliverson, 3 M. & S. 485. Compare Clay v. Southen, 21 L. J. 202, Ex., nom., Clay v. Sothern, 7 Exch. 717, contrasted with Lucas v. Beale, 20 L. J. 134, C. P.; 10 C. B. 739.

(*r*) Sims v. Bond, 5 B. & Ad. 389; 2 Smith, L. C. 6th ed., 355.

(*s*) The expression "undisclosed principal" is ambiguous. It means either a principal who is known to exist, but whose name is not known to the party entering into the contract, or a principal whose existence is not known; *e.g.*, where the other party conceives the agent to be himself the principal. In either case the agent must, from the nature of the thing, contract in his own name, and in either case either the principal or the agent may sue. Schmaltz v. Avery, 20 L. J. 228, Q. B. Story, Agency, ss. 393–410. Compare Thomson v. Davenport, 2 Smith, L. C. 6th ed., 327, 334.

is most frequently acted upon in sales by factors, agents, or partners, in which case either the nominal or the real plaintiff may sue, but it may be equally applied to other cases." (*t*)

Exception 6.—Where an agent has made a contract in the subject-matter of which he has a special interest or property.

Under this exception auctioneers, factors, and other agents of a similar kind have a right to sue for the price of goods sold by them. They are not mere agents, but persons who have an interest in the goods, and to the extent of that interest principals. Thus A., an auctioneer employed to sell the goods of P., has been held able to maintain an action for goods sold and delivered against T., the purchaser. (*x*)

"An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner, or at a public auction room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest, but an auctioneer has also a special property in him coupled with a lien for the charges of the sale, the [140] commission and the auction duty which he is bound to pay. In the common course of auctions there is no delivery without actual payment; if it be otherwise the auctioneer gives credit to the vendee entirely at his own risk." (*y*)

Exception 7.—Where the agent has paid away money of the principal's under circumstances which gave a right to recover it back.

(*t*) Sims v. Bond, 5 B. & Ad. 393, per CURIAM.

(*x*) Williams v. Millington, 1 H. Bl. 81. A broker is not such an agent, and can not sue on contracts made by him as a broker. Fairlie v. Fenton, 1 L. R. 5 Ex. 169.

(*y*) Williams v. Millington, 1 H. Bl. 84, 85, judgment of LOUGHBOROUGH C. J.

"If an agent pays money for his principal by mistake or otherwise which he ought not to have paid, the agent as well as the principal may maintain an action to recover it back." (*z*) T., a custom-house officer, exacted from A., the master of a ship, exorbitant fees on account of the ship. The payment of the particular fees was imposed by statute upon the master personally. It was held that either the owners or the master might sue the custom-house officer for the excess. (*a*)

The four last exceptions all (*b*) rest on the ground that, while the principal has the ordinary right of every principal to sue for the breach of a contract made on his behalf, the agent has been dealt with as a party (though not the only party) to the contract or to the transaction which gives a right of action as if there had been a breach of contract, *e. g.*, where the agent sues for money of his principal's which he was wrongfully induced to pay.

The choice or election of suing in the name either of the principal or the agent is subject to certain limitations, of which the object is to secure that this right of choice or election shall not be so exercised as to work injustice to any of the persons concerned in the contract.

1st. The agent's right to sue is subject to the principal's right of interposition. "Wherever the principal, as well as the agent, has a right to maintain a [141] suit upon any contract made by the latter, he may generally supersede the right of the agent to sue, by suing in his own name. (*c*) So the principal may, by his own intervention, intercept or suspend or extinguish the rights of the agent under the contract, as if he makes other arrangements with the other contracting party, or waives his claims under it, or receives payment thereof, or in any other manner discharges it. This, indeed, results from the general principle of law, that every man may waive or extinguish rights, the benefit whereof ex-

(*z*) Story, Agency, s. 398.
(*a*) Stevenson v. Mortimer, Cowp. 806
(*b*) Exceptions, 4–7.
(*c*) Sadler v. Leigh, 4 Camp. 194.

clusively belongs to himself, and that whatever rights are acquired by an agent are acquired for his principal." (*d*)

This doctrine applies strictly only where the agent entering into the contract is the mere representative of the principal, and has acquired no interest, lien, or other claim under it by virtue of his agency. For if he has (*e. g.*, as being a factor) acquired such interest, lien, or other claim, then to the extent thereof he is entitled to protection, as well against the principal as against the other contracting party. (*e*)

2ndly. Where an undisclosed principal sues on a contract made with his agent, "the defendant is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party;" (*f*) (that is) the defendant may avail himself of all defenses which would have been available to him against the agent at the time of the disclosure had that agent been really a principal. (*g*)

[142] By "undisclosed" principal is here meant a principal of whose existence as principal the defendant was unaware at the time of making the contract, and not a principal whose name was unknown to the defendant, but whom he knew or supposed to exist. In other words a defendant who contracts with an agent supposing him to be a principal, may in an action by the real principal avail himself of defenses good against the agent. But a defendant who contracts with an agent knowing him to be only an agent, but not knowing whose agent he is, can not, in an action by the principal, avail himself of a defense good against the agent. (*h*)

3rdly. When an agent sues in his own name the defendant may avail himself of those defenses which are

(*d*) Story, Agency, s. 403.

(*e*) Story, Agency, s. 407. Drinkwater v. Goodwin, Cowp. 251; Morris v. Cleasby, 1 M. & S. 576; Hudson v. Granger, 5 B. & Ald. 27; Coppin v. Walker, 7 Taunt. 237; Robinson v. Rutter, 4 E. & B. 954; 24 L. J. 250. Q. B. This case seems to show that notice is not needed. Smith, Mercantile Law, 7th ed., 161, 162. But see Grice v. Kendrick, L. R. 5, Q. B. 340.

(*f*) Sims v. Bond, 5 B. & Ad. 393, per CURIAM.

(*g*) Thomson v. Davenport, 2 Smith, L. C. 6th ed., 359.

(*h*) Semenza v. Brinsley, 34 L. J. 161, C. P.; 18 C. B., N. S., 467.

good as against the agent who is the plaintiff on the record, (*i*) and may also avail himself of those defenses which are good against the principal for whose benefit the action is brought. (*k*)

The results of suing in the name of the principal or the agent are exemplified by the rules as to the right of set-off.

Set-off.—T. contracts with A., the agent of P., under circumstances which make it possible for an action to be brought either by P. or A.

An action is brought by P.

T. can set-off against a debt claimed by P. any debts due from P. to T. If T. supposed A. to be contracting as principal, he can also set-off debts due from A. to T. (*l*) If T. knew that A. was contracting as an agent, even though T. did not know that he was contracting as an agent of P., and à fortiori, if T. knew that A. was contracting as an agent of P., T. can not set off [143] debts due from A. to him. (*m*)

Where a purchaser bought goods of a person whom he knew to be only an agent, though he did not know whose agent he was, it was held that the purchaser could not, in an action by the principal for the price of the goods, set-off a debt due to the purchaser from the agent. For, in order to make this defense of set-off "a valid defense, it seems obvious that the plea must show that the contract was made by a person whom the plaintiff entrusted with the possession and the ownership of the goods, that he sold them as his own in his own name as principal with the authority of the plaintiff, and that the defen-

(*i*) Gibson v. Winter, 5 B. & Ad. 96. See *ante*.

(*k*) Thomson v. Davenport, 2 Smith, L. C. 6th ed., 358, 359. This doctrine, though true in general, is subject to considerable qualifications, and does not apply where the agent suing is not a mere agent, *i. e.*, where he has himself an interest in the contract. See, *e.g.*, Robinson v. Rutter, 4 E. & B. 954; 24 L. J. 250, Q. B.

(*l*) George v. Claggett, 7 T. R. 359; 2 Smith, L. C., 6th ed., 113, 115, 116; Sims v. Bond, 5 B. & Ad. 393.

(*m*) Semenza v. Brinsley, 18 C. B., N. S., 467; 34 L. J. 161, C. P.

dant then believed him to be the principal in the transaction." (*n*)

An action is brought by A.

T. can set-off debts due to him from A. T. can not, it would seem, set-off debts due to him from P. (*o*), though, perhaps, such debts may now be pleaded as an equitable defense. (*p*) The difficulty of pleading this set-off depends upon the words of the statute allowing set-off. (*q*) Other defenses, *e. g.*, payment to the principal, may in many cases be pleaded in an action by the agent; but if the agent suing is not a mere agent,—*i. e.*, is a person such as a factor or auctioneer, who has an interest in the contract—it would seem that defenses against the principal only are not available in an action by the agent. (*r*)

RULE 18.—A person who enters into a contract in reality for himself, but apparently as agent [144] for another person, whom he does not name, can sue on the contract as principal. (*s*) [1]

(*n*) Semenza v. Brinsley, 34 L. J. 163, C. P., per CURIAM. See Dresser v. Norwood, 17 C. B., N. S., 466; 34 L. J. 48, C. P.

(*o*) Isberg v. Bowden, 8 Exch. 852.

(*p*) Leake, Contracts, 304; Cochrane v. Greene, 9 C. B., N. S., 448; 30 L. J. 97, C. P.

(*q*) 2 Geo. 2, c. 22, s. 13. See 8 Geo. 2, c. 24.

(*r*) Robinson v. Rutter, 4 E. & B. 954, 24 L. J. 250, Q. B.

(*s*) Schmaltz v. Avery, 16 Q. B. 655; 20 L. J. 228, Q. B.

[1] And where the principal is undisclosed, and the contract is made with the agent, expressly excluding an undisclosed principal, the suit may be in the name of the agent. "Every man has a right to elect what parties he will deal with." Winchester v. Howard, 97 Mass. 303. If an undisclosed principal intervene in such a case, he must do so subject to whatever equities bear upon the ostensible principal. It is true that where the contract is made with the agent, with no conditions excluding liability to another, then the undisclosed principal may, on disclosing himself, sue. But if the other contracting party say, "I contract with you, A., alone; I will have no dealings with P.," and if A. assent to this, then if P. sue, he will, if his agent were authorized and competent to bind him, be estopped by his agent's act; Wharton on Agency and

A person sometimes contracts avowedly and on the face of the contract as an agent, but in reality on his own behalf, and without regard to any principal. The so-called agent is then in reality not an agent, but a person contracting for himself. If the person so contracting merely avows himself to be an agent, and does not give the name of any principal for whom he alleges himself to be acting, he can sue on the contract as a principal, the reason of this being, that the defendant can not be supposed to have entered into the contract in reliance on a principal whose name was not known to him. (*t*)

RULE 19.—A person who contracts, in reality for himself, but, apparently, as agent for another person, whose name he gives, can not sue on the contract as principal.[1]

A. induces T. to contract with him as being the agent and as acting on behalf of a principal P., whom A. names, though in fact A. has no authority to act on behalf of P., and is in reality entering into a contract for his own benefit. A., under these circumstances, can not treat the contract as made with himself, and sue in his own name on showing himself to be the real principal. (*u*) The

(*t*) Schmaltz v. Avery, 16 Q. B. 655 ; 20 L. J. 228, Q. B.

(*u*) Leake, Contracts, 306. Schmaltz v. Avery, 16 Q. B. 655 ; 20 L. J. 228, Q. B. ; Bickerton v. Burrell, 5 M. & S. 383.

Agents, § 431 ; nor can a third person employing an agent, on account of the latter's peculiar qualifications, be defeated, in a suit against the agent on the contract, by the defense that the agent acted as agent for an undisclosed principal. I employ an expert to do a particular work for which he has peculiar qualifications ; if I sue him for neglect or non-performance, I can not be barred by the intervention of an undisclosed principal. Id. § 467.

[1] See last note. Every man has a right to elect what parties he will deal with. See Winchester v. Howard, 97 Mass. 303.

ground of the rule is that T. did not mean to contract with A., but meant to contract with P., and that P. can not by his act turn a contract with another person into a contract with himself. (*v*)

[145] It may be considered doubtful whether, when the contract is partly executed, A. can not, if the contract be not one involving reliance on the personal skill of P., sue T. on showing that he is the principal, and after giving T. notice of the fact. (*x*)

A. contracted in writing with T. for the purchase of an estate expressly as agent of P., named in the contract as principal, but without any authority from the latter, and being himself the real principal in the transaction, and paid a deposit in part payment of the purchase money. It was held that A. could not maintain an action to recover the deposit without giving notice to T. of his real position as principal. (*y*) "Where a man," it is said in this case by ELLENBOROUGH, C. J., "assigns to himself the character of an agent to another whom he names, I am not aware that the law will permit him to shift his situation, and declare himself to be the principal, and the other to be a mere creature of straw. That, I believe, has never yet been attempted. Now, on the face of this agreement, it is stated that the plaintiff made the purchase, paid the deposit, and agreed to comply with the conditions of sale for P., and in the mere character of agent. Is not this account of himself to be taken fortissimè contra proferentem; that is, that he was really treating in the character which he assigned to himself at the time of the purchase, and has not the defendant with whom the plaintiff dealt as agent a right still to consider him as such, notwithstanding he would now sue in the character of principal? Supposing that he might, under a different state of circumstances, have entitled himself to sue in his own name, surely the defendant ought to have had notice of the plaintiff's real situation before he is

(*v*) Boulton v. Jones, 2 H. & N. 564; 27 L. J. 117, Ex.
(*x*) Compare Smith's Mercantile Law, 7th ed., 162
(*y*) Bickerton v. Burrell, 5 M. & S. 383.

subjected to an action at the plaintiff's suit, and while it was open to him to make a tender." (*z*)

A. made a written contract for the sale and [146] delivery of the goods to T., in which he described himself as agent for P., a named principal; and T., after having full knowledge that A. was not an agent, as described, but was the real principal in the transaction, accepted a part delivery of the goods from A., and paid for them. It was held that T. could not afterwards refuse to receive and pay for the remainder, and that A. might sue in his own name upon T.'s default in doing so. (*a*)

"The defendant's counsel . . . cited the case of Bickerton v. Burrell, (*b*) as an authority that the plaintiff could not sue . . . in his own name. That case is indeed, in one respect stronger than the present, inasmuch as that was for money had and received, whereas this is a case of an executory contract. If, indeed, the contract had been wholly unperformed, and one which the plaintiff, by merely proving himself to be the real principal, was seeking to enforce, the question might admit of some doubt. In many such cases, such as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent can not then show himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed, without the knowledge of who is the real principal, may be the general rule. But the facts of this case raise a totally different question, as the jury must be taken to have found, under the learned judge's direction, that this contract has been in part performed, and that part performance accepted by the defendants with full knowledge that the plaintiff was not the agent, but the real principal. If so, we think the plaintiffs may after that very properly say

(*z*) Ibid., 386, 387, per ELLENBOROUGH, C. J.
(*a*) Rayner v. Grote, 15 M. & W. 359; 16 L. J. 79, Ex.
(*b*) 5 M. & S. 383.

that they can not refuse to complete that contract
[147] by receiving the remainder of the goods and paying the stipulated price for them. And it may be observed that this case is really distinguishable from Bickerton v. Burrell (*c*) on the very ground on which that case was decided; for here, at all events, before action brought and trial had, the defendants knew that the plaintiff was the principal in the transaction." (*d*)

In spite of some expressions used by the judges in deciding the two foregoing cases, there is, it is submitted, no case showing that a person who has entered into a contract for a named principal can afterwards sue on that contract in his own name, on showing himself to be the principal. To allow him to sue would be to violate the "rule of law, that if a person intends to contract with A., B. can not give himself any right under [the contract]."(*e*)

(*c*) 5 M & S. 383.
(*d*) Rayner v. Grote, 15 M. & W, 365, 366, per CURIAM.
(*e*) Boulton v. Jones, 2 H. & N. 565, per POLLOCK, C. B.

CHAPTER VI.

PARTNERS AND UNINCORPORATED COMPANIES.

RULE 20.—A firm or an unincorporated company can not sue in its name as a firm or as a company, but must sue in the names of the individual members of the firm or of the company.[1]

A firm is apt to be considered by the public as a corporation, *i. e.*, as a body distinct from the members composing it, and possessing rights and incurring liabilities distinct from those of its members. (*a*) But a firm is not, in the courts of common law, recognized as in any way distinct from the persons who compose it. Hence, the firm of M. & Co., being nothing more than the individuals A., B., and C., of whom it consists, any change amongst its members destroys its identity, and the so-called property, debts, and liabilities of the firm are, in truth, merely the property, debts, and liabilities of A., B., and C., who compose the firm. (*b*)

From this legal view of a partnership or firm, it follows that the rules which apply to actions by or against members of a firm, that is, persons who in ordinary language are called partners, equally apply to the proceedings of persons who are partners in one particular transaction

(*a*) See Chapter VII.

(*b*) 1 Lindley, Partnership, 2nd ed., 208, 209. Richardson v. Bank of England, 4 Myl. & Cr. 171, 172; De Tastet v. Shaw, 1 B. & Ald. 664.

[1] And the agreement by several persons to do business under the name of one, constitutes them partners, even though under a written agreement as to the business, not to be "for any purpose of business or manufacture or partnership." Manhattan Brass, &c. Co. v. Sears, 45 N. Y. 797.

only, (*c*) and who, therefore, might not generally be considered as forming a partnership.

[149] The member of a partnership is, at law as in commerce, the agent of the firm for transacting its business, and, therefore, every partner fills the character both of a principal and of an agent. (*d*)

An "unincorporated company" is fundamentally a large partnership, (*e*) from which it differs mainly in the following particulars, viz., that it is not bound by the acts of the individual partners, but only by those of its directors or managers; (*f*) that shares in it are transferable; (*g*) and that it is not dissolved by the retirement, death, bankruptcy, &c., of its individual members. (*h*)

It follows, from the characteristics of a firm, that an action by a partnership, whether trading under the name of M. & Co., or, *e. g.*, of the Royal Mining Company, must be brought in the names of A., B., C., &c., who compose the partnership. (*i*) And this holds good even though the company consists of a hundred persons.

The difficulty which this rule places in the way of actions on contract (*k*) by unincorporated companies, has led to many futile attempts to evade it; *e. g.*, by bringing actions in the name of the chairman or of the directors pro. tem., (*l*) or of some servant, *e. g.*, the purser (*m*) of the company.

The shareholders in a cost-book mining company agreed "that calls in arrear should be considered to be debts due from the defaulting shareholder to the purser;" but an action brought against the defaulter by the purser

(*c*) Hill v. Tucker, 1 Taunt. 7; Osborne v. Harper, 5 East, 225; Hotsall v. Griffith, 4 Tyr. 487.

(*d*) Story, Partnership, 2nd ed., s. 1. Cox v. Hickman, 8 H. L. 268; 30 L. J. 125, C. P.; Kilshaw v. Jukes, 34 L. J. 217, Q. B.; 3 B. & S. 847; Bullen v. Sharp, L. R. 1, C. P. 86; 35 L. J. 105, C. P.

(*e*) 1 Lindley, Partnership, 2nd ed., 495.

(*f*) Ibid., 249. Burnes v. Pennell, 2 H. L. 497.

(*g*) 1 Lindley, Partnership, 2nd ed., 237, 221.

(*h*) Ibid., 238, 497.

(*i*) Woolf v. City Steam Boat Co., 7 C. B. 103; 18 L. J. 125, C. P.

(*k*) Rule 13, and Chapter XXXIV.

(*l*) Phelps v. Lyle, 10 A. & E. 113.

(*m*) Hybart v. Parker, 4 C. B., N. S. 209; 27 L. J. 120, C. P.

was held not to be maintainable, as being "nothing more nor less than the case of a person who is a mere servant of the company suing a member of the [150] company between whom and himself there [was] no privity of contract and no consideration." (*n*)

Exception 1.—Where an unincorporated company is empowered by statute to sue, &c., in the name of its public officer.

Some unincorporated companies (*o*) are enabled to sue (and liable to be sued) in the name of their public officer, *e. g.*, secretary, manager, &c.; and proceedings taken by or against him may be continued by or against his successors.

Exception 2.—Where an unincorporated company is being wound up.

In the case of an unregistered (*p*) company, the court of chancery (*q*) may, on the company's being wound up, make an order vesting its property in the official liquidator; and, if such an order is made, he may sue (and be sued) in his official name, or in such other name as the court may direct, as the representative of the company. (*r*)

(*n*) Hybart v. Parker, 27 L. J. 122, C. P., judgment of WILLIAMS, J., *ante*.

(*o*) *a*. Banking companies under 7 Geo. 4, c. 46 (extended by 27 & 28 Vict. c. 32). *b*. Companies under Letters Patent Act (7 Will. 4 & 1 Vict. c. 73). *c*. Companies formed under private Acts.

(*p*) See Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199, by which an unregistered company is defined as "any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members, and not registered under this Act." A company registered under the previous Acts seems, for the purpose of winding-up, to be considered a registered company. *In re* Torquay Bath Co., 32 Beav. 582. Compare 2 Lindley, Partnership, 2nd ed., 1491 and 1214. It should also be remarked that a company may be registered under the Act of 1862 for the purpose of being wound up.

(*q*) In the case of a mining company subject to the jurisdiction of the Stannaries, the Court of the Vice-Warden of the Stannaries; and in the case of a company registered in Ireland, the Irish Court of Chancery; and of a company registered in Scotland, the Court of Session. Companies Act, 1862, s. 81.

(*r*) See Companies Act, 1862 (25 & 26 Vict. c. 89), s. 203. Compare 1

[151] RULE 21.—All persons who are partners in a firm, or members of an unincorporated company, at the time when a contract is made with the firm or the company, should join in an action for the breach of it.

A firm being merely the persons who compose it, this rule is simply an application of the general principle that all the persons with whom a contract is made must join in an action for the breach of it. (*s*) [1]

The rule is modified by the existence of dormant and nominal partners.

A dormant partner is a person who does not appear to be a partner, but is so, and occupies the position of an undisclosed principal, (*t*) and therefore always may, and never need (*u*) join in an action on a contract made with the firm.

The firm of M. & Co. consists of A., B., and C., of whom A. and B. are known partners, and C. a dormant partner. If a contract is made either with the firm of M. & Co. or with A. on behalf of the firm of M. & Co., an action for the breach thereof may be brought either by A. and B., or by A., B., and C.

A nominal partner is a person who appears to be a partner, but is not so. He sometimes must, and sometimes need not, join in an action on a contract made with the firm.

1st. If a contract is made expressly with a real and

Lindley, Partnership, 2nd ed., 1274, 1275. The fact that a company has stopped payment does not prevent it from suing and being sued by its public officer. Davidson v. Cooper, 11 M. & W. 778. 1 Lindley, Partnership, 2nd ed., 501.

(*s*) See Rule 13. Bullen, Pleadings, 3rd ed., n. (*a*), 227. See Phelps v. Lyle, 10 A. & E. 113; Garrett v. Handley, 3 B. & C. 462; Teed v. Elworthy, 14 East, 210. 1 Lindley, Partnership, 2nd ed., 477.

(*t*) See Rule 17. Exception 5. Cothay v. Fennell, 10 B. & C. 671.

(*u*) 1 Lindley, Partnership, 2nd ed., 476, 477. Phelps v. Lyle, 10 A. & E. 113; Leveck v. Shafto, 2 Esp. 468.

[1] See ante.

with a nominal partner, they must join in suing on it. (*x*)

2ndly. Primâ facie, a nominal partner ought [152] to join in suing on any contract, whether express or implied, made with the firm; for an agreement with the firm is primâ facie an agreement with the persons who apparently make up the firm. But if it be distinctly shown that a person who is apparently the member of a firm is in reality not so (*i. e.*, that he is merely a nominal partner), a contract made with the firm is not in reality made with him, and he need not join in suing upon it. (*y*)

3rdly. It is an open question whether a nominal partner can join in cases in which it has been established that there is no necessity for his joining. (*z*) As a mis-joinder (*a*) is a much less serious error than a non-joinder of plaintiffs, a nominal partner should, as a matter of prudence, join in all actions on contracts made with the firm.

A partner or member of an unincorporated company can not join in suing on any contract made before he joined the firm or company, (*b*) since he was not one of the parties with whom the contract was made.

He can, indeed, sue on a bill or note transferable by delivery, which was given to the firm before he became a member of it; for, in such a case, the plaintiffs sue, not as partners, or as the persons with whom the contract was made, but as being the holders of the bill or note. (*c*)

Suppose, again, that a debt is due to the firm of A. & B., and that C. joins them as partner; A., B., and C. may sometimes sue X., the debtor, for the debt due to the old firm of A. & B. But they can do this only when X. has

(*x*) Guidon v. Robson, 2 Camp. 302. Compare Teed v. Elworthy, 14 East, 210.

(*y*) Compare Teed v. Elworthy, 14 East, 210, with Kell v. Nainby, 10 B. & C. 20.

(*z*) See in the affirmative, Collyer, Partnership, 467; in the negative, 1 Lindley, Partnership, 2nd ed., 479. Compare Bond v. Pittard, 3 M. & W. 357.

(*a*) See Chapter XXXIV.

(*b*) Wilsford v. Wood, 1 Esp. 182; Ord v. Portal, 3 Camp. 239. 1 Lindley, Partnership, 2nd ed., 489, 490.

(*c*) Ibid., 490.

either expressly or by his conduct contracted to pay to the new firm of A., B., & C. the debt due to the old
[153] firm of A. & B. A., B., and C., therefore, sue, not in respect of the debt due to A. and B., but in respect of a new contract made with A., B., and C. after C. joined the firm. (*d*)

A retired partner or member of an unincorporated company must sue on every contract made whilst he was a partner of the firm or member of the company. (*e*)

Exception.—One partner must or may sue alone on contracts made with him on behalf of the firm in the same cases in which an agent must or may sue on contracts made with him on behalf of his principal. (*f*)

Each partner is an agent of his co-partners within the scope of the partnership business. Hence, he must sue alone on contracts made with the firm (his principals) in cases in which an action must be brought in the name of an agent, and can not be brought in the name of a principal. He must sue alone when he is contracted with by deed in his own name (*g*) when he is made the party to a bill of exchange, &c., (*h*) or where the right to sue upon a contract is, by the terms or circumstances of it, expressly restricted to one of several partners. (*i*)

A partner, again, may sue alone where a contract is made with him in his own name. In this case either the partner with whom the contract appears to be made
[154] may sue as being the party to it, or the whole firm

(*d*) Moore v. Hill, Peake, Add. Cases, 10; 1 Lindley, Partnership, 2nd ed., 491.

(*e*) Dobbin v. Foster, 1 C. & K. 323.

(*f*) See Rule 17. Exceptions 1–7, *ante.*

(*g*) Rule 17. Exception 1.

(*h*) Ibid. Exception 2. Compare, however, as to the difference between bills indorsed in blank, on which any holder may sue, and bills specially indorsed, on which the persons named as drawers, indorsees, &c., must sue. Law *v.* Parnell, 29 L. J. 17, C. P.; 7 C. B., N. S. 282; Machell v. Kinnear, 1 Stark. 499; Guidon v. Robson, 2 Camp. 302; Bawden v. Howell, 3 M. & G. 638; Phelps v. Lyle, 10 A. & E. 113; 1 Lindley, Partnership, 2nd ed., 474.

(*i*) Rule 17. Exception 3. Lucas v. De la Cour, 1 M. & S. 349. Compare Robson v. Drummond, 3 B. & Ad. 303; Humble v. Hunter, 12 Q. B. 310; 17 L. J. 350, Q. B.

may sue as being the persons really interested in it. (*j*) The principle, in short, to be kept firmly in mind is, that each partner being an agent for the firm, the question, whether he must or may sue without joining his co-partners, is in reality nothing but the inquiry, whether an agent must or may sue on a contract made with him on behalf of his principal.

Set-off.—Debts due from one partner, A., can not be set-off against debts due to the firm, A., B., and C., nor can debts due from the firm, A., B., and C., be set-off against debts due to one partner A. (*k*)

This principle is subject to exceptions.

The first is, that where one partner is or has become (*e. g.*, by the death of his co-partners) the only person capable of suing for a debt due to the firm, the debtor can set-off a debt due, not from the firm, but from the partner individually. A., for example, is the only surviving partner of the firm of A., B., and C.; A., therefore, has become the only person who can sue for debts due to the firm. (*l*) X., the debtor, can, in an action by A., set-off debts due to him, not from the firm of A., B., and C., but from A. individually. (*m*)

The second is, that if the firm have allowed one of the partners, A., to enter into a contract as if he were the only person with whom the contract was made, X., the other contracting party, may set-off against the [155] debt due to the firm, debts due to him from A. individually. (*n*) (*o*)

(*j*) Skinner v. Stocks, 4 B. & Ald. 437; Garrett v. Handley, 4 B. & C. 664; Cothay v. Fennell, 10 B. & C. 671; Alexander v. Barker, 2 C. & J. 133. See Rule 17. Exception 4.

(*k*) Owen v. Wilkinson, 5 C. B., N. S., 526; 28 L. J. 3, C. P. A debt due from partners on a joint and several obligation (*e. g.*, a promissory note), may always be treated as a debt due from each of the partners separately. Hence, if A. bring an action for a debt due to him individually, a debt due from A., B., and C. on their joint and several promissory note may be set off against A.'s claim. 1 Lindley, Partnership, 2nd ed., 516, 517.

(*l*) See Rule 16.

(*m*) French v. Andrade, 6 T. R. 582; Slipper v. Sidstone, 5 T. R. 493.

(*n*) Gordon v. Ellis, 2 C. B. 821; 15 L. J. 178, C. P.; Ramazotti v. Bowring, 7 C. B., N. S., 851. See 1 Lindley, Partnership, 2nd ed., 514–520.

(*o*) "If a partner, being indebted to a person who is indebted to the firm,

RULE 22.—One partner or member of an unincorporated company can not sue another upon any matter involving the accounts (*p*) of the partnership or company.

The technical ground of this rule is, that, in an action on any matter involving the partnership accounts, all the members of the firm must be either plaintiffs or defendants; and if, therefore, such an action were brought by or against a partner, the same person would appear both as plaintiff and as defendant. If, for example, A. were to sue the firm of A., B., and C., for the price of work and labor done for it, (*q*) for a share of the profits, (*r*) on a bill accepted in the name of the firm, (*s*) or for money which he had been compelled to pay for the firm, (*t*) the action would be an action brought by A. against A., B., and C., *i. e.*, A. would be both plaintiff and defendant; and, as already pointed out, (*u*) the same person can not occupy at once the position both of plaintiff and of defendant. On the same ground, if A. is a partner in two firms (*e. g.*, A., B., & C., and A., X. & Y.), neither firm can sue the [156] other on a contract made between them, (*x*) nor, after A.'s death, can either firm sue the other on a contract made between them whilst he was a partner in both; (*y*) nor if the firm of A., B., & C. become indebted

agrees with him that one debt shall be set-off against the other, and the two settle their accounts together on this footing, the firm is bound by this transaction, and the debt owing to it is extinguished." Ibid. 517. Wallace v. Kelsall, 7 M. & W. 264.

(*p*) Smith, Mercantile Law, 7th ed., 34, 35; 2 Lindley, Partnership, 2nd ed., 878–883.

(*q*) Holmes v. Higgins, 1 B. & C. 74.

(*r*) Bovill v. Hammond, 6 B. & C. 149.

(*s*) Neale v. Turton, 4 Bing. 149.

(*t*) Sadler v. Nixon, 5 B. & Ad. 936.

(*u*) See Rule 5.

(*x*) Moffat v. Van Millingen, 2 B. & P. 124; Mainwaring v. Newman, Ibid. 120.

(*y*) 2 Lindley, Partnership, 2nd ed., 883. Bosanquet v. Wray, 6 Taunt. 597.

to M., and M. dies, leaving A. his executor, can A., even as executor, bring an action for the debt due to M. (*z*)

Companies empowered to sue.—These companies are merely partnerships endowed with the right of suing and being sued in the name of a public officer.

If this officer (*e. g.*, the secretary) represents each of the members of the company, he can no more sue a member than one partner can sue another, since he represents as much the person sued as the person suing, and therefore would occupy, in an action, the position at once of plaintiff and of defendant. (*a*)

Modern Acts of Parliament generally make the officer the representative of the company, as distinguished from its members. Where this is done, legal proceedings between the public officer and individual members are as unobjectionable as proceedings between incorporated companies and their shareholders. (*b*)

There is, however, great difficulty in the way of an action by a shareholder against an unincorporated company, at any rate, for declared dividends; since, "even if the company be empowered to sue and be sued by a public officer, and an action by a shareholder [157] against him for a dividend declared and payable might possibly lie, there would be very great not to say insuperable difficulties in executing a judgment obtained by the plaintiff in such an action." (*c*)

The rule, it must be remembered, has no application

(*z*) Moffat v. Van Millingen, 2 B. & P. 124. The rule applies to persons who are partners in a particular venture.

(*a*) 2 Lindley, Partnership, 2nd ed., 858. Hichens v. Congreve, 4 Russ. 562; McMahon v. Upton, 2 Sim. 473; Hughes v. Thorpe, 5 M. & W. 656.

(*b*) 2 Lindley, Partnership, 2nd ed., 858. Wills v. Sutherland, 4 Ex. 211; 18 L. J. 450, Ex.; 5 Ex. 980; 20 L. J. 28 Ex. (Ex. Ch.); Reddish v. Pinnock, 10 Ex. 213; Smith v. Goldsworthy, 4 Q. B. 430; 11 L. J. 151, Q. B.; Chapman v. Milvain, 5 Ex. 61; 19 L. J. 228, Ex. It is settled that one public officer of a banking company under 7 Geo. 4, c. 46, is the proper person to sue a shareholder for calls. 2 Lindley, Partnership, 2nd ed., 858.

(*c*) 2 Lindley, Partnership, 2nd ed., 888, 889. The difficulty as to executing the judgment seems to apply to all actions against an unincorporated company by a shareholder.

to actions by one partner against another, in respect of matters unconnected with the partnership business. (*d*)

The rule, again, has no application to persons who are not actually partners.

Hence, actions are constantly brought on agreements for partnership. If, for example, the member of a firm agrees to introduce a stranger, an action lies for a breach of the contract. (*e*)

Exception 1.—Where there is an agreement which, though relating to partnership business, can be treated as separate and distinct from other matters in question between the partners.

Under this exception, which includes many different cases, a partner may often sue his fellow-partners.

Thus an action can be brought by one partner against another for the breach of a covenant or express agreement entered into by his co-partner, not by the firm, with him. (*f*) He can, again, maintain an action against his co-partners for the non-performance of a written agreement to render accounts and divide profits, (*g*) for rent covenanted to be paid, (*h*) or for not indemnifying him against a debt, (*i*) and he can often sue his co-partners on a bill of exchange.

[158] If a bill or note is given to A. by his partners, B. and C., in such a form as not to bind the firm, but to bind B. and C., A. can sue them on the bill, even though it had reference to a partnership transaction; for A. is acknowledged by the bill to have a claim against B. and C. independent of any claim which they have against

(*d*) 2 Lindley, Partnership, 2nd ed., 873, 875.

(*e*) McNeill v. Reid, 9 Bing. 68; Gale v. Leckie, 2 Stark. 107, Andrews v. Garstin, 10 C. B., N. S., 444; 31 L. J. 15, C. P. Compare Lindley, Partnership, 2nd ed., 863, 864.

(*f*) See Lindley, Partnership, 2nd ed., 869, 870; Bullen, Pleadings, 3rd ed., 229.

(*g*) Owston v. Ogle, 13 East, 538.

(*h*) Bedford v. Brutton, 1 B. N. C. 399.

(*i*) Want v. Reece, 1 Bing. 18; 2 Lindley, Partnership, 2nd ed., 870.

him ; (*k*) but if a bill is accepted in such a manner as to bind the firm, a partner can not sue his co-partners upon it. (*l*)

A partner further can sue his co-partner for a breach of a contract to furnish capital, (*m*) or for not contributing the share which he had agreed to contribute to the partnership expenses, (*n*) and can bring an action against his fellow-partners, where the partnership has been dissolved, and it has been agreed that they should take his share of the partnership property at a certain value, for the amount of the valuation ; (*o*) for a final balance struck after a statement of accounts ; (*p*) for money received to his use, (*q*) or for money of his own placed in their hands for a specified partnership purpose, and no other, and misapplied. (*r*) So, he can sue them on an agreement to indemnify him in respect of some particular transaction, (*s*) and for contribution in respect of a particular loss. (*t*)

Exception 2.—Where the matters in respect of which [159] an action is brought are connected with the partnership business only through the wrongful act of the partner sued. (*u*)

Where one partner received money to the use of another and paid it to the firm, it was held that he might be sued, for he was bound to hand the money over to his

(*k*) Neale v. Turton, 4 Bing. 149, Esp., judgment of BEST, C. J., 151 ; Heywood v. Watson, 4 Bing. 496 ; Beecham v. Smith, E. B. & E. 442 ; 27 L. J. 257. Q. B., Esp., judgment of CROMPTON, J., 260.

(*l*) Neale v. Turton, 4 Bing. 149, 151 ; Moffat v. Van Millingen, 2 B. & P. 124. Byles, Bills, 8th ed., 38, 39.

(*m*) Hesketh v. Blanchard, 4 East, 144.

(*n*) Brown v. Tapscott, 6 M. & W. 119; French v. Styring, 2 C. B., N. S., 357 ; 26 L. J. 181, C. P., Esp., judgment of COCKBURN, C. J. ; 2 C. B., N. S., 364, 365 ; 26 L. J. 183, C. P. ; Elgie v. Webster, 5 M. & W. 518.

(*o*) Jackson v. Stopherd, Cr. & M. 361.

(*p*) Moravia v. Levy, 2 T. R. 483 ; Foster v. Allanson; 2 T. R. 479.

(*q*) Graham v. Robertson, 2 T. R. 282.

(*r*) Wright v. Hunter, 1 East, 20.

(*s*) Coffee v. Brian, 3 Bing. 54.

(*t*) Sedgwick v. Daniell, 2 H. & N. 319; 27 L. J. 116, Ex. For cases in which partner may sue his fellow-partner, see 2 Lindley, Partnership, 2nd ed., 868–876.

(*u*) 2 Lindley, Partnership, 2nd ed., 873.

co-partner: (*x*) and so where a partner, in fraud of his co-partners, gave a note in the name of the firm for a private debt of his own, and his co-partners were compelled to pay the note, he was held liable to them for all which they had been compelled to pay; (*y*) since, "if a person who owes a debt to A., by any contrivance causes B. to pay it, the action for money paid will lie to recover back the amount, and the machinery by which the mischief was brought about is utterly immaterial." (*z*)

RULE 23.—Actions for breaches of contracts made with a firm must be brought :—

1. On the bankruptcy of the firm, by the trustee (*a*) or trustees of the bankrupts. (*b*)

2. On the bankruptcy of one or more partners, by the solvent partners, together with the trustee, or trustees of the bankrupt partner or partners.

The expression "bankruptcy of a firm" means
[160] nothing more than the bankruptcy of all the persons who make up the firm.

If all the partners, A., B., and C., are bankrupt, any action which but for the bankruptcy would have been brought in their names, and therefore, any action on a contract with the firm, must be brought by the trustee or trustees of the bankrupts.

The property of the different bankrupts will generally, under the Bankruptcy Act, 1869, (*c*) vest in the same

(*x*) Smith v. Barrow, 2 T. R. 476.

(*y*) Cross v. Cheshire, 7 Exch. 43; 21 L. J. 3, Ex.

(*z*) Ibid., per POLLOCK, C. B. Conf. Hailbut v. Nevill, L. R. 4, C. P. 354.

(*a*) The term "the trustee" is substituted by the Bankruptcy Act, 1869, for the expression "assignee in bankruptcy." Whenever a trustee in bankruptcy is referred to, he is, to distinguish him from an ordinary trustee, described as the trustee.

(*b*) Partners, like other persons, can, of course, after bankruptcy, bring actions in which they sue merely as trustees for other people. See Chapter IX., *post*.

(*c*) 32 & 33 Vict. c. 71, s. 102.

trustee; but if a separate trustee should be appointed for each of the partners, all the trustees must join in an action on contracts with the partnership. (*d*)

The effect of the bankruptcy of one partner is to dissolve the firm, both as regards the bankrupt and as regards the partners *inter se*, and to make the trustee a tenant in common (not a co-partner) with the solvent partner of all the partnership property. (*e*) Hence any action which but for the bankruptcy of one of the partners, C., would have been brought by A., B., and C., must after his bankruptcy be brought in the names of A. and B., the solvent partners, and the trustee of the bankrupt C. (*f*) It should further be noticed that owing to the legal fiction by which the title of the trustee dates, not from the time of C.'s being adjudicated a bankrupt, but from the time of the commission of an act of bankruptcy, (*g*) it may happen that A., B., and the trustee, can bring an action where A., B., and C. could not have sued. (*h*)

The Bankruptcy Act, 1869, enables the trustee, subject to certain conditions, to use the names of the solvent partners if they are unwilling to bring an action. (*i*) If, on the other hand, the trustee declines to [161] join in an action, the solvent partners may use his name upon indemnifying him. (*k*)

Unincorporated Companies.—If a company which is empowered to sue, &c., is being wound up, actions may be brought in the name of the officer empowered to sue. If a company not empowered to sue, &c., is being wound up, it will probably be registered for that purpose under the Companies Act, 1862. (*l*) In this case an action may be

(*d*) Hancock v. Haywood, 3 T. R. 433, 435.

(*e*) 2 Lindley, Partnership, 2nd ed., 1100, 1101, 1118, 1119.

(*f*) Eckhardt v. Wilson, 8 T. R. 140; Thomason v. Frere, 10 East, 418; Graham v. Robertson, 2 T. R. 282.

(*g*) Bankruptcy Act, 1869, s. 11.

(*h*) Heilbut v. Nevill, L. R. 4, C. P. 354.

(*i*) 32 & 33 Vict. c. 71, s. 105.

(*k*) Whitehead v. Hughes, 2 D. P. C. 258; 2 Lindley, Partnership, 2nd ed., 1119.

(*l*) Companies Act, 1862, s. 180; 2 Lindley, Partnership, 2nd ed., 1219.

brought either in the name of the official liquidator or in such other name as the court may direct. (*m*)

"The doctrine that by the bankruptcy of one member of a firm the whole firm is dissolved, is not, it seems, applicable to mining partnerships; (*n*) and although the bankruptcy of a shareholder in an unincorporated company with transferable shares may dissolve the company as to him, (*o*) it is conceived that such bankruptcy does not dissolve it as to the other shareholders in ter se;" (*p*) and though the trustee becomes, on the bankruptcy of a shareholder, entitled to his shares, he does not become by the mere bankruptcy a shareholder. (*q*)

It would seem that on the bankruptcy of a member of an unincorporated company, provided it be one not empowered to sue by an officer, actions on contracts made before the bankruptcy should be brought in the name of the solvent members and of the trustee. (*r*)

[162] RULE 24.—On the death of a partner, the surviving partners and ultimately the last survivor, or his representative, must sue on contracts made with the firm.

A., B., and C., are partners, C. dies, an action on any contract made with the firm, *i. e.*, with A., B., and C., must be brought by A. and B., and the representatives of C. can not join. (*s*)

The same rule appears to hold good with regard to unincorporated companies, supposing of course that these companies are not empowered to sue by a public officer.

(*m*) Companies Act, 1862, s. 203; 2 Lindley, Partnership, 2nd ed., 1274, 1275.
(*n*) *Ex parte* Broadbent, 1 Mont. & A. 638.
(*o*) Greenshield's Case, 2 De. G. & S. 559.
(*p*) 2 Lindley, Partnership, 2nd ed., 1101.
(*q*) Ibid. Conf. Bankruptcy Act, 1869, s. 23.
(*r*) But see Bankruptcy Act, 1869, s. 23.
(*s*) See Rule 16.

CHAPTER VII.

CORPORATIONS AND INCORPORATED BODIES.

RULE 25.—A corporation or incorporated body, must sue in its corporate name.

A corporation is a fictitious person, created by law, and endowed with a capacity to acquire rights and incur obligations as a means to the end for the attainment of which the corporation is created. It may, and generally does, consist of a number of individual members, but the rights and obligations of these individuals are not the same as the rights and obligations of the corporate body. (*a*) The fundamental distinction, therefore, between a partnership and a corporation or company is, that while the firm of M. and Co. is nothing but A., B., and C. who compose the firm, a corporation— *e. g.*, the Royal Miners' Co. (Limited),—is totally distinct from A., B., and C., the members of the company. It follows, that while a firm must sue in the names of the individual members, a corporation or company must sue in its corporate name. (*b*) It is an illustration of the true character of a corporation that, its existence is unaffected by the retirement, death, &c., of the individual members of it, and that a corporation can sue and be sued by its own members.

(*a*) Even in the case of a corporation sole, *e. g.*, a bishop, the rights of the corporation are distinct from the rights of the person who constitutes the corporation. 1 Lindley, Partnership, 2nd ed., 4. Bradshaw v. Bank of Upper Canada, L. R. 1, P. C. 479 ; Metropolitan Saloon Co. v. Hawkins, 28 L. J. 201, Ex. ; 4 H. & N. 87.

(*b*) 2 Lindley, Partnership, 2nd ed., 888.

[164] RULE 26.—A corporation, or incorporated body, can not sue on a contract not under seal. (*c*)

A corporation can not sue on any contract not under seal, because a corporation can not, as a general rule (subject, however, to exceptions which have now grown larger than the rule itself), (*d*) enter into any contract, binding either upon the other party to the agreement or upon the corporation, except under its corporate seal.

"The rule of law requiring contracts entered into by corporations to be generally entered into under seal and not by parol, appears to be one by no means of a merely technical character. . . . . The seal is required as authenticating the concurrence of the whole body corporate, ... either a seal or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation." (*e*)

Hence, an agreement to supply a mining company with iron bars, (*f*) a contract with a water company to supply iron pipes, (*g*) an engagement by a corporation to pay an increased salary to a town clerk, (*h*) to pay for work done in building a workhouse, (*i*) and many other agreements by corporations (*k*) have been held invalid, because not made under seal.

[165] *Exception* 1.—Where a corporation enters into a

(*c*) Bacon, Abr., Corporations, E. 3.

(*d*) South of Ireland Coll. Co. v. Waddle, L. R. 3, C. P. 474, judgment of MONTAGUE SMITH, J.

(*e*) Mayor of Ludlow v. Charlton, 6 M. & W. 823, judgment of ROLFE, B. See also Arnold v. Mayor of Poole, 4 M. & G. 860; 12 L. J. 97, C. P.

(*f*) Copper Miners' Co. v. Fox, 16 Q. B. 229; 20 L. J. 174, Q. B.

(*g*) East London Water Works Co. v. Bailey, 4 Bing. 283.

(*h*) R. v. Mayor of Stamford, 6 Q. B. 433.

(*i*) Lamprell v. Billericay Union, 3 Ex. 283; 18 L. J. 282, Ex.

(*k*) Paine v. Strand Union, 8 Q. B. 326; Arnold v. Mayor of Poole, 4 M. & G. 860; Diggle v. London and Blackwall Rail. Co., 5 Ex. 442; 19 L. J 308, Ex.

contract concerning matters necessarily incidental to the purposes of the business of the corporation.

A corporation can sue (*l*) on contracts relating to matters of the corporation, since, "it is now perfectly established by a series of authorities that a corporation may with respect to those matters for which they are expressly created, deal without seal. This principle is founded on justice and public convenience, and is in accordance with common sense." (*m*) This exception, though specially applicable to bodies constituted for the sake of trade, (*n*) and though it has been considerably extended in order to meet their convenience, (*o*) appears, in principle, to apply to all corporations.

It is often difficult to decide whether a given contract falls within the rule or the exception. A contract, for example, with a company incorporated for the working of collieries to supply them with a pumping-engine has been held valid, though not under seal. (*p*) So has an agreement to supply a steamboat company with provisions, (*q*) and an agreement by the same company for the carriage of a passenger. (*r*) Again, on the same principle, an agreement by a telegraphic company [166] to pay a commission to an agent on messages ob-

(*l*) A corporation's right to sue is, subject to very slight exceptions, strictly correlative to its liability to be sued, *i. e.*, it can be sued on contracts on which it can sue, and vice versâ; and can not be sued on contracts on which it can not sue, and vice versâ. It is, therefore, convenient to introduce, as exemplifications of the general rule, and the exceptions to it, cases which directly refer only to a corporation's liability to be sued.

(*m*) Australian Royal Mail Co. v. Marzetti, 11 Exch. 234; per POLLOCK, C. B.

(*n*) Clarke v. Cuckfield Union, 1 Bail. C. C. 86, judgment of WIGHTMAN, J.

(*o*) Henderson v. Australian Royal Mail Co., 5 E. & B. 409; 24 L. J. 322, Q. B.; South of Ireland Colliery Co. v. Waddle, L. R. 3, C. P. 474, judgment of MONTAGUE SMITH, J.

(*p*) South of Ireland Colliery Co. v. Waddle, L. R. 3, C. P. 463. 37 L. J. 211, C. P.

(*q*) Australian Royal Mail Co. v. Marzetti, 11 Exch. 228; 24 L. J. 273, Ex.

(*r*) Henderson v. Australian Royal Mail Co., 5 E. & B. 409; 24 L. J. 329 Q. B.

tained for the company, (*s*) by a gas company to supply gas, (*t*) for guardians to pay for goods supplied, (*u*) or for work done, (*x*) have been held valid, though not made by deed. But with these cases should be contrasted others (some of which have been already mentioned), such as the Copper Miners' Co. v. Fox, (*y*) where a contract, that the defendant would supply the plaintiff with iron rails, was held not valid, because it was not under seal, and had not reference to matters necessarily incidental to the business of the company. "Had the subject-matter of this contract been copper, or if it had been shown in any way to be incidental or ancillary to the business of copper miners, the contract would have been binding, although not under seal; for where a trading company is created by charter, while acting within the scope of that charter, it may enter into the commercial contracts usual in such a business in the usual manner. But the iron rails, the subject-matter of this contract, were not shown to have any connection with the business of copper miners." (*z*) And similar to the Copper Miners' Co. v. Fox is the London Dock Co. v. Sinnot, (*a*) in which it was held, that a contract with the London Dock Co. (a corporation constituted for the purpose of carrying on a particular trade), for cleansing and removing the filth accumulating in their docks, was invalid, because not under seal. The decision in this latter case is, however, open to some doubt. (*b*)

[167] *Exception* 2.—Where the contract relates to acts of trivial importance or of constant recurrence.

A corporation may sue on contracts not under seal which refer to matters of trivial importance, of frequent

(*s*) Reuter v. Electric Telegraph Co., 26 L. J. 46, Q. B.; 6 E. & B. 341.
(*t*) Church v. Imperial Gas Co., 6 A. & E. 846.
(*u*) Sandars v. St. Neot's Union, 8 Q. B. 810.
(*x*) Haigh v. North Bierly Union, 28 L. J. 62, Q. B.; E. B. & E. 873 Nicholson v. Bradfield Union, L. R. 1, Q. B. 620; 35 L. J. 176, Q. B.
(*y*) 16 Q. B. 229; 20 L. J. 174, Q. B.
(*z*) Copper Miners' Co. v. Fox, 20 L. J. 177, Q. B., per CURIAM.
(*a*) 27 L. J. 129, Q. B.; 8 E. & B. 347.
(*b*) South of Ireland Colliery Co. v. Waddle, L. R. 3, C. P., 463, 471.

occurrence, or of immediate urgency ; so that the making these contracts in the usual way with the authentication of the corporate seal would be inconvenient and absurd, (*c*) *e. g.*, agreement for the supply of coals, (*d*) or of gas. (*e*) It has, however, been doubted, whether anything really turns upon the importance or the frequency of the matters to which a contract relates, (*f*) and this exception must, therefore, it would appear, be looked upon simply as an extension of the first exception.

Exception 3.—Where the consideration (*g*) for the contract is executed on the part of the corporation.

" Whatever may be the consequences where the agreement is entirely executory on the part of the corporation, yet if the contract instead of being executory is executed on their part, if the persons who are parties to the contract have received the benefit of the consideration moving from the corporation, (*h*) in that case, . . . both upon principle and decided authorities, the other parties are bound by the contract and liable to be sued thereon by the corporation." (*i*)

This exception is less firmly established than the others, (*k*) and has no application to actions against [168] corporations. (*l*)

(*c*) Diggle v. London and Blackwall Rail. Co., 5 Exch. 450, judgment of ALDERSON, B.

(*d*) Nicholson v. Bradfield Union, L. R. 1, Q. B. 620; 35 L. J. 176, Q. B.

(*e*) Beverley v. Lincoln Gas Co., 6 A. & E. 829.

(*f*) South of Ireland Colliery Co. v. Waddle, L. R. 3, C. P. 470, judgment of BOVILL, C. J. See Henderson v. Australian Royal Mail Co., 24 L. J. 326, judgment of ERLE, J.

(*g*) See Diggle v. London and Blackwall Rail Co., 5 Exch. 442, 451 ; 19 L. J. 308, 311, Ex.

(*h*) See *ante.*

(*i*) Fishmongers' Co. v. Robertson, 5 M. & G. 192, per CURIAM. Compare London Water Works Co. v. Bailey, 4 Bing. 283, 287 ; Leake, Contracts, 257.

(*k*) Australian Royal Mail Co. v. Marzetti, 11 Ex. 228 ; 24 L. J. 273, Ex. ; South of Ireland Colliery Co. v. Waddle, L. R. 3, C. P. 463.

(*l*) 1 Lindley, Partnership, 2nd ed., 306. Mayor of Ludlow v. Charlton, 6 M. & W. 815 ; Lamprell v. Billericay Union, 3 Ex. 283 ; 18 L. J. 282, Ex. Leake, Contracts, 256, 257. But conf. Broom, Com., 2nd ed., 553.

Exception 4.—Where there is a contract implied by law.

Where a contract is implied by law, a corporation may sue, though there exists no agreement under seal as a basis of the action. The ground of this exception is, it is conceived, that the basis of the action is not in reality a contract, but the existence of circumstances which in the view of the law give the plaintiff a right to sue as if there were a contract between him and the defendant. (*m*) Hence a corporation may maintain an action to recover reasonable satisfaction for the use and occupation of land, held and occupied by the permission of the corporation without a demise under seal; (*n*) and on the same principle a corporation may, it is conceived, frequently support an action for money had and received, though there may have been no contract between the corporation and the defendant. (*o*)

Exception 5.—Where a corporation is authorized by statute to contract otherwise than under seal.

Companies are in many cases, *e. g.*, under the Metropolis Gas Act, 1860, (*p*) the Companies Clauses Act, 1845, (*q*) the Companies Acts, 1856, (*r*) and 1867, (*s*) authorized to contract otherwise than by deed, and [169] can of course sue on contracts made in the manner directed by statute.

RULE 27.—A corporation or incorporated body can not sue on contracts ultra vires. (*t*)

(*m*) See *ante*.

(*n*) Dean of Rochester v. Pierce, 1 Camp. 466; Marquis of Stafford v. Till, 4 Bing. 75, 77. In this case, however, there may fairly be considered to be a real though tacit contract between the parties.

(*o*) Conf. Hall v. Mayor of Swansea, 5 Q. B. 526. Jefferys v. Gurr, 2 B. & Ald. 833.

(*p*) 23 & 24 Vict. c. 125, s. 20.

(*q*) 8 & 9 Vict. c. 16, s. 95.

(*r*) 19 & 20 Vict. c. 47, s. 41.

(*s*) 30 & 31 Vict. c. 131, s. 37.

(*t*) Taylor v. Chichester Rail. Co., L. R. 2, Ex. 379, judgment of BLACKBURN,

RULE 28.—When an incorporated company is in the course of winding-up, actions on behalf of such company are brought and continued in its corporate name by the official liquidator. (*u*)[1]

Companies can not be made bankrupt, (*v*) but are wound up under the provisions of the Companies Act, 1862.

A registered company under the Companies Acts, 1857, 1858, and 1862, sues in the same way as far as form is concerned when in the course of winding up as before the winding up commenced, (*x*) *i. e.*, actions are brought and continued in the corporate name of the company. (*y*)

Set-off.—In an action for calls, brought by a limited company being voluntarily wound up under the Companies Act, 1862, against a contributor, the defendant may set-off a debt due to him from the company. (*z*) But [170] where a limited company is being wound up by the court or under the supervision of the court, the defendant in an action for calls can not set-off debts due to him from the company. (*a*)

J. The reader is referred for the explanation to this rule to the analogous rule with regard to actions against companies. Chapter XIV.

(*u*) Companies Act, 1862, ss. 94, 95. 2 Lindley, Partnership, 2nd ed., 1274–1278, and Companies Act, 1862, s. 203. The companies referred to in this Chapter are, it should be remembered, incorporated companies.

(*v*) See Bankruptcy Act, 1869, s. 5.

(*x*) 2 Lindley, Partnership, 2nd ed., 1274. See *ante*.

(*y*) See *ante*.

(*z*) Brighton Arcade Co. v. Dowling, L. R. 3, C. P. 175; 37 L. J. 427, C. P.

(*a*) Brighton Arcade Co. v. Dowling, L. R. 3, C. P. 175; 37 L. J. 427, C. P.; Grissell's Case, L. R. 1, Ch. App. 528.

[1] And irregularities in the appointment of such person (in this case a receiver) are not available as a defense to an action brought by him in the course of winding up affairs. Case v. Marchend, 23 La. Ann. 60.

CHAPTER VIII.

HUSBAND AND WIFE.

RULE 29.—A wife can not during coverture sue without her husband.[1]

A wife is in the eye of the law for some purposes one person with her husband. (*a*) She is therefore incapable of bringing an action at law to obtain redress for an injury sustained in respect of her person or property, unless the action be brought with her husband's concurrence, and in his name as well as her own. (*b*)

Right of wife to use husband's name.—As a married woman can never sue alone, the courts, to a limited extent, protect her in the use of her husband's name without his authority. Where a wife sued as executrix in her own name and that of her husband without his authority,

(*a*) Coke, Litt., 112*a*; 2 Steph., Com., 6th ed., 281, 282. The Queen, whether regnant or consort, is considered a feme sole. Ibid., 283.

(*b*) Ibid., 289. Eubanke v. Owen, 5 A. & E. 298; Ayling v. Whicher, 6 A. & E. 259.

[1] This rule is modified in the various states. In New York, it has been held that a married woman domiciled in another state, and by its laws holding property to her separate use, in seeking a remedy to recover for loss or injury thereto, in New York, may sue in her own name; Stoneman v. Erie Railway Co., 52 N. Y. 429; and so a joinder of husband and wife was held in a New Hampshire case to entitle to a non-suit; Cooper v. Alger, 51 N. H. 172; and see Reilly v. United States, 7 Ct. of Cl. 504; Ahrens v. State Bank, 3 S. C. 401; Filer v. New York, &c., R. R. Co., 49 N. Y. 92; Marston v. Ward, 35 Tex. 797; Merewether v. Smith, 44 Ga. 541; Peru v. French, 55 Ill. 317; Mix v. King, Id. 434; Pancoast v. Burnell, 32 Iowa, 394; Rowe v. Smith, 45 N. Y. 230 Rawson v. Pennsylvania R. R. Co., 48 N. Y. 212.

the court refused to stay proceedings absolutely, but stayed them until security was given to the husband against the costs of the action. (*c*) Where a wife living apart and formally separated from her husband, brought an action of trespass in her own name and in that of her husband, the court refused to stay proceedings on the mere ground of the action being brought without his consent. (*d*) But even when the wife sues as executrix, (*e*) the husband has the power to release or [172] settle the action. (*f*)

Exception 1.—Where the husband is civilly dead.

A wife can sue alone when her husband is civilly dead, either permanently or for a time, *e. g.*, by imprisonment or transportation. (*g*)

Her right to sue alone ceases with the cessation of her husband's civil death, *e. g.*, by the termination of his punishment. If he has been transported, and does not return after the end of his punishment, his wife, it seems, can sue alone, on the ground of his having abjured the realm. (*h*)

A man's being an alien enemy is not a ground on which his wife can sue in her own name. (*i*) "Whether it is to be assumed that the contract was entered into before or after marriage, the husband ought to be joined, and it is no answer to say that he is an alien enemy, and therefore can not sue. It may be a hard case, but the hardship is not so great as it at first seems, because the rights of the alien enemy being forfeited to the Crown, it is in the power, and it may be the duty, of the Crown to enforce

(*c*) Proctor v. Brotherton, 23 L. J. 116, Ex.; 9 Exch. 486.

(*d*) Chambers v. Donaldson, 9 East, 470.

(*e*) 2 Williams, Executors, 6th ed., 904.

(*f*) Chambers v. Donaldson, 9 East, 470.

Perhaps, in a case of clear hardship, the court might interfere by preventing the release from being pleaded (Innell v. Newman, 4 B. & Ad. 419), or possibly by allowing a replication setting forth the facts. As to co-plaintiffs, *ante*.

(*g*) Belknap's Case, Coke, Litt., 133*a*, 133*b*; Jewson v. Read, Loft. 142. See *ante*.

(*h*) Carroll v. Blencowe, 4 Esp. 27.

(*i*) De Wahl v. Braune, 1 H. & N. 178; 25 L. J. 343, Ex.

its rights by inquisition, and take possession of the husband's property and right, and then use those rights jointly with and for the benefit of the wife." (*k*)

Exception 2.—Where the husband is legally presumed to be dead.

A wife can sue alone where her husband is pre-
[173] sumed in law to be dead. This presumption arises after a lapse of seven years, if he has gone abroad and absented himself, and no account can be given of him during his absence. (*l*)

Exception 3.—Where a wife has a "judicial separation" or "protection order" under 20 & 21 Vict. cap. 85, ss. 26 and 21.

"In every case of a judicial separation, the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs, and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant, provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use; provided also that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband." (*m*)

The protection order places the wife "in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under (20 & 21 Vict. cap. 85), if she obtains a decree of judicial separation." (*n*)

(*k*) Ibid., 344, Ex., judgment of POLLOCK, C. B. The wife of an alien enemy may, however, be sued alone, see Chapter XVI.

(*l*) Hopewell v. De Pinna, 2 Camp. 113.

(*m*) 20 & 21 Vict. c. 85, s. 26.

(*n*) Ibid., s. 21.

But though an order protects the property acquired by her since the commencement of the desertion, it does not entitle her to continue an action commenced before the order was made; (*o*) and it may be doubtful whether after the order, she can sue for causes of action which were complete before the order was made. (*p*)

SUBORDINATE RULE.

A husband can not bring an action against his wife, or a wife against her husband.

This subordinate rule follows immediately from the fact, that a wife can neither be sued (*q*) nor sue without joining her husband.

A husband may, however, enter into a contract with a third person as trustee for his wife, and such trustee may bring an action against him. (*r*)

RULE 30.—A husband and wife must sue jointly in two (*s*) cases, *sc.*

1. On contracts made by the wife before marriage:

2. On contracts in which the wife claims as executrix, or administratrix.[1]

(*o*) Midland Rail. Co. v. Pye, 10 C. B., N. S., 179; 30 L. J. 314, C. P.

(*p*) See, however, Johnson v. Lander, L. R. 7 Eq. 228.

(*q*) See Rule 5 and Chapter XVI.

(*r*) 2 Steph., Com., 6th ed., 282.

(*s*) A husband and wife must also sue jointly, it is said in a third case, *sc.*, on covenants running with the land of which they are joint assignees (Middlemore v. Goodale, Cro. Car. 503, 505. See Wootton v. Steffenoni, 12 M. & W. 129; Broom, Parties, 2nd ed., s. 108).

[1] Regulated by statutes of the different states. See last note. In Ohio, a married woman who is a tenant for years may, with her husband, maintain against the lessor a suit for specific performance, and on payment of the purchase-money, compel a conveyance. Bain v. Bickett, 1 Cinc. 161.

This and the next rule, (*t*) can only be understood by bearing in mind the effect of marriage on the personal property of the wife.

This property may consist either of personal chattels in possession, or of choses in action. (*u*) The former, whether belonging to her at the time of the marriage, or accruing to her during coverture, become, in general, (*w*) the absolute property of the husband. (*x*) The [175] latter, whether belonging to the wife at the time of the marriage, or accruing to her during coverture, do not belong to the husband absolutely, but become his only conditionally upon his reducing them into possession, *i. e.*, making them his own, during coverture. (*y*)

B., for example, has at the time of her marriage with A., possession of £100, and £50 is owing to her from X. On her marriage, the £100 becomes the absolute property of A. The £50 does not become his absolute property; and if he were to die without reducing it into possession, it would continue the property of B. Suppose, however, that A. pays his debt of £50, either to B. or to A.; or, suppose that the amount is actually recovered from him in an action. In either case the £50, which was before a chose in action, and as such belonging to B., has been reduced into possession, and in consequence becomes the absolute property of A., so that on his death it passes to his representatives. The rights of a wife at common law, as regards the choses in action, have been described by the Court of Queen's Bench in the following language:

"There is no doubt that all personal property of a corporeal nature, such as goods or cash belonging to the wife before marriage, vests in the husband by the marriage, and that all such property given to or acquired by the wife after marriage also vests in the husband. But

(*t*) Rule 31.

(*u*) For the distinction, see *ante*.

(*w*) Coke, Litt., 351 b; 2 Steph., Comm., 6th ed., 286.

(*x*) This is not so as to property to which she is entitled in autre droit, *e. g.* as executrix. 2 Steph., Comm., 6th ed., 286.

(*y*) 2 Steph., Comm., 6th ed., 286, 287; Wilkinson v. Gibson, L. R. 4 Eq. 162.

choses in action belonging to the wife before marriage do not vest in the husband unless he has done some act to reduce them into possession during the coverture; even during the coverture the husband may permit the wife to make a contract, in an action on which he may join with her during her life, though he may disaffirm her interest, and sue on the contract as made with himself alone. If he does permit the wife to make such a contract, and does not reduce it into possession during the coverture, it survives to the wife. The earlier cases illustrating this rule are cases of written contracts, such as bonds or [176] promissory notes given to his wife, or to the husband and wife during coverture. As to these, the law is stated in 1 Williams on Executors, 6th ed., p. 798, to be fully settled, 'that if there be a bill or note made to a married woman during coverture, the husband may sue upon it, or permit his wife to take an interest in it, in which case it appears to stand on the same footing as if it had been made to her before coverture.' Except from the difficulty of showing that the contract was, in fact, made with the wife, we see no reason why the rule of law should be different in this respect in the cases of contracts in writing and any other." (*z*)

Choses in Action—Reduction into Possession.—In order, therefore, to determine whether a wife must, (*a*) or may, (*b*) join in an action; or, what is in reality the same inquiry, whether her or her husband's representatives are the proper parties to bring an action, it is necessary to consider the two following questions:

1*st Question.*—Was the claim in respect of which an action is to be brought ever a chose in action of the wife's?

The distinction between property in possession, *e. g.*, the cash, articles of furniture, &c., which a person actually possesses, and the choses in action, *e. g.*, debts, which he can only recover by action, is in itself sufficiently plain.

(*z*) Fleet v. Perrins, L. R. 3, Q. B. 541, 542, per CURIAM.
(*a*) Rule 30.
(*b*) Rule 31.

But it is not always easy to decide under which head given property falls. Thus it has been doubted whether bills, notes, &c., are property in possession or choses in action; and, though it is now decided that they are choses in action, the fact that they were at one time considered personal chattels in possession, still, to some extent, affects the rules as to the parties to sue upon them. The two following cases exemplify the difficulties which [177] may still arise in determining the character of a given claim:

By a settlement made on the marriage of A. with B., his wife, certain leaseholds were assigned to X., in trust, to allow B. to receive the rents during her life. B., during coverture, received the rents from X., and lent a portion of the money so received to him. It was held, that after B.'s death, A. might in his own right sue X. for the money, in an action for money received. (*c*) It was contended on behalf of X., that the money lent by B. was a chose in action, which during her life must have been sued for by A. and B., and on B.'s death must be sued for by her administrator. The decision of the Court went on the ground that the money when received by B. became A.'s property in possession, which in point of law belonged to him, and that he, therefore, sued B., not for a chose in action of his wife, but to recover his own money owing to himself.

X. received money from M. to be appropriated to the use of B., the wife of A., and wrote to B., telling her that he held the money at her disposal. A. survived B., and died, never having at any time interfered as to the money. It was held by the Court of Queen's Bench, (*d*) and by the majority of the Exchequer Chamber, (*e*) that the representative, not of A., but of B., was the proper party to sue for the money, as the facts showed a chose in action conferred on the wife with which the husband had not interfered during coverture.

(*c*) Bird v. Peagrum, 13 C. B. 639; 22 L. J. 166, C. P.
(*d*) Fleet v. Perrins, L. R. 3, Q. B. 536; 37 L. J. 233, Q. B.
(*e*) L. R. 4, Q. B. 500; 37 L. J. 536, Q. B. (Ex. Ch.)

"The facts show that there was a chose in action conferred on the wife with which the husband did not during coverture interfere. The money did not, according to the rule in Williams v. Everett, (*f*) become the money of the person on whose behalf it was remitted until [178] the depositee had by some act attorned to that person, up to which time it remained the money of the remitter. (*g*) The money here was remitted for the use of the wife, and of her alone; and the letters of the defendant attorning to the remittee were addressed to the wife alone, and were promises to her to hold the money at her disposal; and there never was anything done to vest either in the husband or the wife any property in any coin as a personal chattel, so that it remained a mere chose in action in the wife, with which the husband did not interfere." (*h*)

2nd Question. Has the chose in action been reduced into possession?

Suppose it to be determined that a wife once possessed a chose in action. The further question still remains whether her husband has reduced it into possession. (*i*)

The general principle is that his "acts, in order to effect that purpose [viz., of reducing his wife's choses in action into possession], must be such as to change the property in them; or, in other words, must be something to divest the wife's right, and to make that of the husband absolute; such as a judgment recovered in an action commenced by him alone, or an award of execution recovered by him and his wife, or receipt of the money." (*j*)

The most usual modes in which a reduction into possession, *e. g.*, of a promissory note, can be effected by the husband, are receiving the money due, recovering the amount in an action, or, apparently, bringing an action

(*f*) 14 East, 582.
(*g*) See *ante*.
(*h*) Fleet v. Perrins, L. R. 3, Q. B. 542, per BLACKBURN, J.
(*i*) Scarpellini v. Atcheson, 7 Q. B. 875, judgment of DENMAN, C. J.
(*j*) 1 Williams, Executors, 6th ed., 802, 803.

(where this can be done) in his own name alone. (*k*)
[179] The fact of a husband in some respects treating the property of his wife as his own, or expressing an intention to reduce it into possession, is not of itself sufficient to defeat her rights. (*l*)

If the answer to these questions be, that the wife has a chose in action, *e. g.*, a debt due to her, and that the chose in action has never been reduced into possession by her husband, she always may, and in some cases must, join with her husband in an action to recover it, and this principle will be found to be the explanation of most of the rules as to the joinder of husband and wife as plaintiffs.

Case 1.—On all contracts of whatever description (except, perhaps, negotiable instruments, *e. g.*, bills of exchange or promissory notes) (*m*) made with a woman before marriage, actions must be brought during coverture in the names of the husband and of the wife. (*n*)

This rule holds good whatever be the nature of the contract sued upon, and applies as well to actions on so-called implied contracts, *e. g.*, for money had and received, as to other actions ex contractu.

Case 2.—On all contracts in which the wife claims, not in her own right, but in a representative character, *e. g.*, as executrix, an action must be brought in the names of the husband and of the wife. (*o*) "If, however, the husband alter the nature of the debt owing to his wife in the character of executrix or administratrix, he alone may bring the action for recovering it. Thus if he

(*k*) Hart v. Stephens, 6 Q. B. 937; Scarpellini v. Atcheson, 7 Q. B. 864; Gaters v. Madeley, 6 M. & W. 423; Lush, Practice, 3rd ed., 46. It may, however, be a little doubtful whether the bringing an action in the husband's own name is in all cases a sufficient reduction into possession. Compare Scarpellini v. Atcheson, 7 Q. B., 864; 14 L. J. 333, Q. B.; Gaters v. Madeley, 6 M. & W. 423.

(*l*) See Williams, Executors, 6th ed., 801–812.

(*m*) McNeilage v. Holloway, 1 B. & Ald. 218; 1 Williams, Executors, 6th ed., 794.

(*n*) Milner v Milnes, 3 T. R. 627, 631; Benedix v. Wakeman, 12 M. & W. 97; Bullen, Pleadings, 3rd ed., 171.

(*o*) Bullen, Pleadings, 3rd ed., 166; Williams, Executors, 6th ed., 904.

should indulge the debtor with further time, in [180] consideration of an express purpose to pay the husband, &c., he alone may compel payment of it by action, . . . so that joining the wife in the action would be error. He also may sue alone" [though he need not] (*p*) "if the note or security be given to them jointly, as to him, and to his wife as executrix." (*q*)

Effect of death.—On the death of the husband, the right of action on all contracts (*r*) made with the wife before marriage survives to her, and she may either commence, or (supposing an action has already been brought) continue, an action upon them. On the death of the wife, the right of action passes to her administrator. Her husband, who always has a right to be her administrator, must sue in that character. Hence, if she dies after the commencement of an action, the action, it is said, abates, *i. e.*, the proceedings are put an end to. (*s*)

The death of the husband produces no effect on the wife's right to sue on contracts made with her as executrix. She may, that is to say, commence, or (if an action has been already begun) continue, an action upon them in her own name. On the death of the wife, whether before or after action brought, the right of action passes, not to her husband, but to the representative of her testator. B., the wife of A., has claims on a contract made with M., of whom she is executrix. On the death of B., the right of action passes, not to A., but to the representative of M. It seems, therefore, to follow, that if an action be commenced by A. and B., and B. dies, the action will abate.

Effect of Divorce.—Divorce annihilates the marriage from the moment at which it is declared dis- [181] solved. (*u*) The woman, in consequence, retains her

(*p*) Ankerstein v. Clarke, 4 T. R. 616.

(*q*) 2 Williams, Executors, 6th ed., 904, 905.

(*r*) These include negotiable instruments (*e. g.*, bills of exchange), which, perhaps, do not come within Case 1, as the husband apparently may sue upon them alone.

(*s*) Lush, Practice, 3rd ed., 46.

(*u*) Wilkinson v. Gibson, L. R. 4, Eq. 162, 167.

property in all choses in action which her husband has not reduced into possession (*x*) during coverture, and must, therefore, after divorce, sue alone on all contracts made with her before marriage, the claims on which have not been reduced into possession before the marriage was dissolved. (*y*) On the death of the woman, the right to sue on such contracts passes to her representatives. (*z*)

Set-off.—In actions by husband and wife, debts due from the wife, *i. e.*, debts contracted before marriage, (*a*) may be set-off against debts claimed by the husband and wife.

RULE 31.—A husband may sue either alone or jointly with his wife in three cases, *sc.*:

1. On negotiable instruments (*e. g.*, bills of exchange) given to his wife before marriage.

2. On contracts made after marriage with his wife alone.

3. On contracts made after marriage with himself and his wife.[1]

Case 1.—It was at one time considered (*b*) that negotiable instruments, (*e. g.*, bills of exchange) were [182] personal chattels in possession; and though it now may be held as settled that they are to be considered choses in action, yet bills of exchange, notes, &c., still seem to be held (*d*) so far property in possession that a hus-

(*x*) See *ante*.

(*y*) Wilkinson v. Gibson, L. R. 4, Ex. 162, 167.

(*z*) Compare Johnson v. Lander, L. R. 7, Eq. 228.

(*a*) Burrough v. Moss, 10 B. & C. 558; Field v. Allen, 9 M. & W. 694; Lush, Practice, 3rd ed., 46. She can not contract debts during coverture.

(*b*) McNeilage v. Holloway, 1 B. & Ald. 218; Gaters v. Madeley, 6 M. & W. 423; Richards v. Richards, 2 B. & Ad. 447; 1 Williams, Executors, 6th ed., 794. 797.

(*d*) Bullen, Pleadings, 3rd ed., 171. But see Bright, Husband and Wife, 64.

[1] See two preceding notes.

band may sue upon them alone, though given to his wife before marriage.

Such instruments do not become the property of the husband until reduced into possession; and, therefore, pass on the death of the wife to her administrator, and stand (except as regards the right of the husband to sue upon them alone) in the same position as other contracts made with a wife before marriage. (*e*)

Case 2.—A married woman, though incapable of making a contract, is capable of having a chose in action conferred on her, which will survive to her on the death of her husband, unless he has interfered by doing some act to reduce it into possession. (*f*) A wife, that is to say, can not contract, but she may be contracted with, in so far that she may receive rights under a contract. Hence, where a promise is made to a married woman on a consideration proceeding from her solely, as a contract with her to pay for her services rendered, wherever, as it is said, the wife is the "meritorious cause" of the action, there is a contract with her on which either the husband may sue alone in his own name, or jointly in his own name and that of his wife. (*g*) On a bond given to the wife during coverture, the husband and wife may have a joint action during their lives; or the husband may sue during coverture in his own name. (*h*) On a note made to the wife during coverture, the husband may sue [183] alone, or husband and wife may sue jointly. (*i*)

The contracts made with a wife during coverture, of which examples are to be found in decided cases, are mostly contracts in writing, such as bonds, notes, &c.; but there is no reason why a contract should not be made

(*e*) 1 Williams, Executors, 6th ed., 798.

(*f*) Ibid., 794; Dalton v. Midland Rail. Co., 13 C. B. 474, 478; 22 L. J 177, 178, C. P.

(*g*) Bidgood v. Way, 2 W. Bl. 1236; Dalton v. Midland Rail. Co., 13 C. B. 474; 22 L. J. 177, C. P.

(*h* Day v. Padrone, 2 M. & S. 396, n. (*b*); Ankerstein v. Clarke, 4 T. R. 616.

(*i*) Philliskirk v. Pluckwell, 2 M. & S. 393; Howard Burrough v. Moss, 10 B. & C. 558; Bullen, Pleadings, 3.

with a wife by word of mouth. (*k*) It is more difficult to prove that such a contract was made with the wife, and, it must be remembered, that in order to make out a valid simple contract (other than a bill or note), it is necessary to show a consideration proceeding from the wife. Thus it has been held, that a wife could not join in an action for the worth of her labor, inasmuch as the husband was entitled to the proceeds of her labor, and the promise in law, therefore, there being no express promise to the wife, must be made to the husband. (*l*)

Case 3.—Where a contract is made with a husband and wife, *e. g.*, a covenant, bond or promissory note, the husband may sue on it alone, (*m*) or may join his wife. (*n*)

The principle in this case, as in all the other cases in which a husband can sue either alone or jointly with his wife, is, that he can treat a promise made to her during coverture, whether alone or jointly with himself, either as a promise made in reality to himself or as a promise made to her on which she has a right to sue, though she must, from her position, join him as a plaintiff in the action.

A judgment obtained by a husband and wife during coverture, stands on the same footing as a contract
[184] made with the husband and wife jointly. The husband may sue upon it alone, or he may bring an action in his own name, and in that of his wife. (*o*)

Effect of Death.—If a contract be made after marriage, either with the wife alone or with the husband and wife, the effect produced by the death of either party is as follows:

(*k*) Fleet v. Perrins, L. R. 3, Q. B. 536; 37 L. J. 233, 536, Q. B.; L. R. 4, Q. B. 500; 37 L. J. 536, Q. B. (Ex. Ch.. See esp. judgment of BLACKBURN, J., L. R., 3 Q. B. 541, 542; and of CLEASBY, B., L. R., 4 Q. B. 507, 508.

(*l*) Brashford v. Buckingham, 1 Cro. Jac. 77.

(*m*) Ankerstein v. Clarke, 4 T. R. 616.

(*n*) Philliskirk v. Pluckwell, 2 M. & S. 393.

(*o*) 1 Selwyn, N. P., 13th ed., 249; 1 Williams, Executors, 6th ed., 808. If, when an action is brought by the husband and wife the husband dies after judgment, and before the money due on it is recovered, such money is the property of the wife. If, where the husband may join his wife, he prefers to sue alone, this is, it would seem, an election to treat the contract as made with him, and the money due, *e. g.*, on the bond or note is, on his death, the property of his representatives.

On the death of the husband before action brought, the right of action survives to the widow, and not to the husband's representatives. On the death of the wife before action brought, the right of action, on a contract made with her alone, passes to her administrator, and her husband must sue in that capacity. The right of action on a contract made with the husband and wife survives to the husband.

On the death of the husband after action brought, the right of action survives to the wife. No effect is produced on the action, and the recovery is for her benefit. On the death of the wife after action brought, the right of action on a contract with the wife alone, passes to her administrator, and, it would seem, the particular action abates; the right of action on a contract made with the husband and wife survives to the husband. (*p*)

Effect of Divorce. (*q*)—It would appear that the effect of divorce is the same upon all the choses in action of the wife; and that it therefore makes no [185] difference as to the right of a divorced woman to sue alone on contracts made with her, whether they were made before or after marriage. (*r*)

Set-off.—Where a husband sues in his own name without joining his wife, debts due from the husband can be set-off against him. But debts due from the husband on account of his wife, *&c.*, debts contracted by his wife before marriage, can not be set-off.

Where a husband sues in his own name and in that of his wife, debts due from him can not be set-off, but debts due from him on account of his wife, *&c.*, debts contracted by her before marriage, can be set-off.

(*p*) These statements do not apply when the chose in action has been reduced into possession, and, therefore, do not apply where an action has been brought in the husband's name, since bringing such an action is (apparently) equivalent to a reduction into possession. They do not apply to negotiable instruments given to the wife before marriage, which, except as regards the fact that the husband may sue upon them alone, stand in the same position as other contracts made with the wife before marriage.

(*q*) A doubt may (it is conceived) exist as to the effect of divorce on a contract made with the husband and wife.

(*r*) See *ante*.

To put the same thing in a different form, when a husband sues in his own name, the action is treated as one brought by him, and against his claims in such an action debts can not be set-off which are due, not from him, but from his wife. When, on the other hand, the action is brought by the husband and wife, it is considered as one brought by her, though the husband's name must be joined, as it is said, for the sake of conformity, and therefore debts due from her can, and debts due from him can not, be set-off. (*s*)

RULE 32.—The following are the results of errors as to joinder of parties in actions by husband or wife:

1. If a husband sues alone where the wife must (*t*) be joined, the error is fatal.

2. If a wife sues alone where she either must (*t*) or may (*u*) be joined, the only result is to expose her to a plea in abatement.

[186] 3. If a husband sues with his wife where she neither must nor may be joined, the error is fatal.

1. *If a husband sues alone where the wife must be joined, the error is fatal.*—A., the husband of B., sues alone in a case in which B. ought to be joined, *e. g.*, on a contract made with B. before marriage. (*v*) The error is fatal; for the person who really has a cause of action is not the husband, but the wife, though the action ought, as a matter of form, to be brought in her and her husband's names. The error can, if it appears upon the record, be taken advantage of by demurrer, motion in arrest of judgment, or error. If it transpires at the trial, it will be

(*s*) See Lush, Practice, 3rd ed., 46, 47.
(*t*) Rule 30.
(*u*) Rules 30 and 31.
(*v*) Rule 30, Case 1.

a ground for a non-suit or an adverse verdict. (*w*) It is questionable whether this error can be amended.

2. *If a wife sues alone where she either must or may be joined, the only result is to expose her to a plea in abatement.*—Suppose that B. sues alone on a contract made with her before her marriage with A., or on a chose in action, *e. g.*, a bond, given her during coverture. She has in either case a right of action, but she ought as a matter of form, or, as it is said, "for the sake of conformity," to join her husband. The omission to do so is, however, not a fatal error. The defendant can take advantage of it by a plea in abatement, but if he does not plead in abatement, and the fact that the husband ought to have been joined appears at the trial, the defendant can take no advantage of the error whatever. (*x*)

3. *If a husband sues with his wife where she neither must nor may be joined, the error is fatal.*—If A. sues in his own name and in that of B., *e. g.*, on a contract made with him before marriage, the error is fatal.

It would seem that the error can not be amended, for it is not so much a case of misjoinder as of an [187] action brought by a wrong plaintiff. (*y*)

RULE 33.—Where a husband is bankrupt and the trustee in bankruptcy sues in the right of the wife, he must join the wife with him in suing.

Where the right of action of a bankrupt's wife is of such a character that if vested in the bankrupt himself, it would have passed to his trustee in bankruptcy, (*z*) the

(*w*) Bullen, Pleadings, 3rd ed., 171.

(*x*) Ibid.; Dalton v. Midland Rail. Co., 13 C. B. 474; 22 L. J. 177, C. P.

(*y*) See Bolingbroke v. Kerr, L. R. 1, Ex. 222, 223, and Chapter XXXIV. In all cases, except those enumerated, the husband must sue alone on contracts made with the wife. Such contracts are, in fact, not contracts with her, but contracts made with her husband through her as his agent. If a wife sues alone in a case where she can not be joined as plaintiff, she is suing without any cause of action, and must fail.

(*z*) See Chapter IX., *post.*

interest of the bankrupt in such right of action passes to the trustee.

The trustee, that is to say, has the same rights with regard to contracts with the bankrupt's wife, in her own right, as the husband before bankruptcy himself possessed, *e. g.*, if a contract is made with B. before her marriage with A., A.'s trustee has the same interest in the contract as A. himself possessed before the bankruptcy. An action, therefore, can not be brought either in the name of B. alone, (*a*) or in the name of A. and B., (*b*) but that it must be brought in the names of B. and of the trustee, and the recovery will be for the advantage of the trustee.

The assignment, however, in bankruptcy does not reduce the wife's choses in action into possession, and therefore, if the husband die after bankruptcy, the wife's rights of survivorship are not destroyed by the bankruptcy, (*c*) *e. g.*, a contract is made with B., before
[188] her marriage with A., A. becomes bankrupt and then dies, no steps having been taken to reduce B.'s chose in action into possession. B.'s rights under the contract are unaffected by the bankruptcy, and she is the person to sue for its breach.

(*a*) Sherrington v. Yates, 12 M. & W. 855; 13 L. J. 249, Ex.
(*b*) Richbell v. Alexander, 30 L. J. 268, C. P.; 10 C. B., N. S 324.
(*c*) See Roper, Husband and Wife, 2nd ed., 232.

CHAPTER IX.

BANKRUPT AND TRUSTEE.

RULE 34.—The trustee (*a*) of the property of a bankrupt must sue for the breach of any contract made with the bankrupt before bankruptcy in which the bankrupt has both a legal and a beneficial interest.

Trustee must sue.—"The object of all the statutes with regard to bankrupts [has been] that everything that can be turned to profit shall pass" (*b*) immediately on the bankruptcy, and be assigned to some person, called under the former Acts an assignee, and under the present Act a trustee, who shall hold the property thus passing to him for the benefit of the creditors.

This object is thus attained under the Bankruptcy Act, 1869. On the adjudication of bankruptcy, all the property of the bankrupt vests in the registrar of the court, and, on the appointment of a trustee, forthwith passes to and vests in the trustee, (*c*) who is empowered "to bring or defend any action, suit, or other legal proceeding, relating to the property of the [190] bankrupt." (*d*)

The term property is, for the purposes of the Act,

(*a*) "The trustee of the property of a bankrupt" [who is, in subsequent rules called the "trustee"] occupies the position of the assignees in bankruptcy under Bankruptcy Acts prior to the Bankruptcy Act, 1869. This must be borne in mind, since in all the hitherto decided cases the expression "assignee," or "assignees," is used, and is therefore, for the sake of convenience, frequently employed in the explanation of this and other rules contained in the chapters on bankrupts.

(*b*) Smith v. Coffin, 2 H. Bl. 462, judgment of BULLER, J. Compare Rogers v. Spence, 13 M. & W. 571, 581, judgment of DENMAN, C. J.

(*c*) Bankruptcy Act, 1869, s. 17.

(*d*) Bankruptcy Act, 1869, s. 25, cl. 3.

given a wide sense, being defined to mean and include "money, goods, things in action, land, and every description of property, whether real or personal; also obligations, easements, and every description of estate, interest, and profit present or future, vested or contingent, arising out of property as above defined." (*e*) It, moreover, embraces (among other things) "all such property as may belong to and be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance." (*f*)

The present Act therefore directly (*g*) transfers or assigns to the trustee all the rights of the bankrupt under contracts with him and for his benefit; hence the trustee, and not the bankrupt, must sue on all contracts made with the latter, as well for unliquidated (*h*) as for liquidated damages, whether the breach occur before (*i*) or after (*k*) the bankruptcy. And if the contract is executory, and the bankrupt must, in order to claim the benefit of it, do some act on his part, the trustee may (provided the act is one which can be done by the trustee) perform any condition which remains to be performed, and thereupon claim the benefit of the contract. (*l*) "In no case can the party who contracted with the bankrupt set up the bankruptcy against the assignees as a reason for not doing what he has agreed to do. Where, indeed, the pay-
[191] ment of money, or the performance of any other duty by the bankrupt, forms a condition precedent to the doing of the act which the contracting party has agreed to do, there, unless the money is paid or duty performed, either by the bankrupt or his assignees, it is plain on principles altogether independent of any questions arising from bankruptcy . . . that no obligation

(*e*) Ibid., s. 4.

(*f*) Ibid., s. 15. Compare s. 11.

(*g*) Conf. Rogers v. Spence, 13 M. & W. 571, 580, judgment of DENMAN, C. J.

(*h*) Wright v. Fairfield, 2 B. & Ad. 727.

(*i*) Beckham v. Drake, 2 H. L. 846; 10 L. J. 356, Ex.

(*k*) Gibson v. Carruthers, 8 M. & W. 321; 11 L. J. 138, Ex.; Schondler v Wace, 1 Camp. 587.

(*l*) Gibson v. Carruthers, 8 M. & W. 321; 11 L. J. 138, Ex.

exists on the other party to perform his part of the engagement." (*m*) In other words, "every beneficial matter belonging to the bankrupt's estate [vests in the assignees], and amongst others, the right of enforcing unexecuted contracts by which benefit may accrue to that estate, and such as may be performed on the part of the bankrupt by the assignees. . . . . In order to enforce these contracts it is only necessary that the assignees should perform all that the bankrupt was bound to perform, as precedent or contemporary conditions, at the time when he was bound to perform them, and the bankruptcy has no other effect on the contracts than to put the assignees in the place of the bankrupt, neither rescinding the obligations on either party nor imposing new ones, nor anticipating the period of performance on either side." (*n*)

The trustee, further, may either adopt or repudiate the contracts of the bankrupt according as he judges them likely to prove beneficial or the contrary. (*o*) But his repudiation or disclaimer does not leave in the bankrupt any right of action, for if a contract is disclaimed by the trustee it is to be considered as determined from the date of the adjudication, and in no case does the bankrupt retain any interest under it. (*p*)

The bankrupt can not sue.—The bankrupt can not, even with the assent of the trustee, sue on contracts made with him before bankruptcy; for the effect of the bankruptcy has been to transfer or assign his rights to the trustee. Hence, where a person was entitled to a [192] commission for introducing to a tradesman a purchaser of the tradesman's business, and afterwards became bankrupt, and the assignees disclaimed all title to the money, it was held that the bankrupt could not bring an action for it in his own name. (*q*)

The right of a trustee to sue on all contracts made with the bankrupt is subject to the limitation that he can

(*m*) Gibson v. Carruthers, 8 M. & W. 333, per PARKE, B.
(*n*) Ibid., 327, judgment of ROLFE, B.
(*o*) Ibid., 321; 11 L. J. 138, Ex.; Bankruptcy Act, 1869, ss. 23, 24.
(*p*) Bankruptcy Act, 1869, s. 23.
(*q*) Hillary v. Morris, 1 C. & P. 6.

not sue on any contract in which the bankrupt has not both a legal and also a beneficial or equitable interest. In other words, the creditor's representative can not sue on contracts with regard to which the bankrupt has rights either as a cestui que trust or merely as a trustee.

If the bankrupt has not a legal interest in a contract, but simply a beneficial interest, the contract must in point of law be made, not with him, but with some other person who is legally interested in it, and is the right person to sue upon it. (*r*) Any money, however, recovered in such an action vests in the trustee of the bankrupt's property. If, on the other hand, the bankrupt has a legal interest in a contract, but has no beneficial or equitable interest in it whatever, he must himself be a mere trustee for some third person. No interest in this case passes to his trustee. (*s*) The bankrupt retains his legal interest in the contract, and must sue upon it in his own name for the benefit of the person really interested. Though where a bankrupt has merely a legal interest in a contract, nothing passes to his trustee, yet if the bankrupt has any beneficial interest, however small, if, that is to say, any portion whatever of the money recovered in an action upon it, would, but for the bankruptcy, have gone to the bankrupt himself, then the right of action for a breach of the contract passes to the trustee, who, however, recovers partly for his own benefit as such trustee,
[193] and partly for the benefit of the cestui que trust, or the other person beneficially interested. (*t*)

A trustee is sometimes both legally and beneficially interested in a contract, and therefore able to sue upon it, though the bankrupt, had he remained solvent, must have sued upon it, if at all, for the benefit of some third person. This is the result of the doctrine of relation, or the rule that the trustee's title to the property of the bankrupt dates back, not to the time of the adjudication

(*r*) See *ante*.

(*s*) Bankruptcy Act, 1869, s. 15.

(*t*) D'Arnay v. Chesneau. 13 M. & W. 796, 809. Compare Parnham v Hurst, 8 M. & W. 743; Castelli v. Boddington, 1 E. & B. 66; 22 L. J. 5, Q. B.; Lush, Practice, 3rd ed., 49.

of bankruptcy, but to the commission of an act of bankruptcy, or as it is called in the Bankruptcy Act, 1869, the commencement of the bankruptcy. (*u*) The trustee being considered for legal purposes the possessor of the bankrupt's property at a time before he was adjudicated a bankrupt, can often annul transactions of the bankrupt and act as having both a legal and equitable interest in a contract in which the bankrupt, from having assigned it to a third party, had retained a merely legal interest.

Suppose, for instance, that a person, after the commission of an act of bankruptcy on which he is subsequently adjudged bankrupt, but before the date of the adjudication of bankruptcy, sells to some third party, M., who knows of the act of bankruptcy, a debt due to him. After the adjudication of bankruptcy, the trustee can treat the sale as void, and sue for the debt, though it is manifest that the bankrupt himself could have sued for the debt only for the benefit for M., since he had parted with all his equitable interest in it. (*x*)

Exception 1 (*y*).—Contracts, the breach of which involves injury to the person or to the feelings of the bankrupt.

Though "the general principle is, that all rights [194] of the bankrupt which can be exercised beneficially for the creditors . . . pass [to the assignees], and the right to recover damages may pass, though they are un-

(*u*) Bankruptcy Act, 1869, s. 15.

(*x*) Compare Bankruptcy Act, 1869, ss. 11, 15, 95.

(*y*) The words of the Bankruptcy Act, 1869, transferring to the trustee the property of the bankrupt, are considerably wider than the expressions employed in the corresponding sections of earlier Bankruptcy Acts (compare Bankruptcy Act, 1869, ss. 4, 15, and 17, with Bankruptcy Act, 1849, s. 141), and distinctly pass to the trustee the bankrupt's things in action, under which term may be included all the bankrupt's rights of action whatever, whether arising from breach of contract or from tort. The result is, that whilst it is certain that the trustee can sue in all cases in which the assignees could have sued, it can not, in the absence of decisions, be considered as established, that where the assignees could not sue under the former Acts, the trustee can not sue under the present Act. In other words, the exceptions to the foregoing rule, as also the exceptions to the next rule as well as the validity of the next rule itself, must be considered as open to doubt.

liquidated, this principle is subject to exception. The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt, in respect of his body, mind, or character, and without immediate reference to his rights of property. Thus it has been laid down that the assignees can not sue for breach of promise of marriage, for seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by process of law." (*z*) To express the same thing somewhat differently, "there are some exceptions to the generality of the right of the assignees. In cases where the personal estate is only affected through some wrong or injury to the person or the feelings of the bankrupt, and the loss or gain to the personal estate would be greater or less, according to the compensation given for such injury, whether by breach of contract or otherwise, the right of action would not pass to the assignees." (*a*)

[195] The damages recovered in an action for such breaches of contract, during the continuance of the bankruptcy, become the property of the trustee. (*b*)

Exception 2.—Contracts uncompleted at the time of bankruptcy in which the personal service of the bankrupt is of the essence of the contract.

"Executory contracts in which the personal skill or conduct of the bankrupt forms a material part do not in general pass to the Trustee." (*c*)

A distinction must, it would seem, be drawn between two kinds of contracts, each of which involve the personal service of the bankrupt. Such contracts may be either —first, contracts the performance of which is rendered impossible by the bankruptcy (*e. g.*, a contract by the

(*z*) Beckham v. Drake, 2 H. L. C. 603, 604, opinion of ERLE, C. J. On the question, how far such an action is one for breach of contract, see *ante*.

(*a*) Ibid., 617, opinion of WIGHTMAN, J.

(*b*) 1 Griffith & Holmes, Bankruptcy, 303; Bankruptcy Act, 1869, s. 15; cl. 3, s. 11.

(*c*) Leake, Contracts, 649.

bankrupt to enter into a partnership); or, secondly, contracts which, though they can not be performed by any one but the bankrupt, can be performed by him in spite of the bankruptcy, *e. g.*, a contract to write a book, paint a picture, &c.

The law to the first class of contracts is clear. Neither the bankrupt nor the trustee can perform the part agreed to be performed by the bankrupt, and therefore neither the bankrupt nor the trustee can bring an action against the other party to the contract for non-performance of his part. "There is a certain class of contracts in which it is manifest that bankruptcy must put an end to all claim of the bankrupt or his assignees to the performance of them by the solvent party. The contract of partnership is a familiar instance; and in every case where the motive or consideration of the solvent party was founded, wholly or in part, upon his confidence in the skill or personal ability of the bankrupt, if the bankrupt from his circumstances is unable to perform his part, the assignees are not entitled to substitute either their own capacity, or skill, or credit, for that of the bankrupt." (*e*) "It can [196] not be doubted, that where a contract remains to be executed, and can not be executed without the co-operation of the bankrupt, the assignees can not enforce the contract, at all events, unless they can procure him to co-operate." (*f*)

The rule as to the second class of contracts is not so clear.

The bankrupt may, it is conceived, himself perform his own part, *e. g.*, write a book or paint a picture, and compel the other party to perform his part of the contract by paying for the book or picture. The matter of doubt is, whether an action against the purchaser ought to be brought by the bankrupt or by his trustee. Some expressions used in the passages already cited suggest that the trustee may sue if the bankrupt performs his

(*d*) Gibson v. Carruthers, 8 M. & W. 343, judgment of Lord ABINGER C. B.

(*f*) Beckham v. Drake, 2 H. L. C. 598, opinion of WILLIAMS, J.

part. It would, however, seem that under the former Bankruptcy Acts the bankrupt was the right person to sue for the breach of any contract involving the personal skill or conduct of the bankrupt. Whether this is so under the present Act is questionable. It is at any rate clear that the trustee can not sue on such contracts unless he can induce the bankrupt to perform his part, and that money recovered by the bankrupt in an action on such a contract during the continuance of the bankruptcy is the property of the trustee.

It is difficult to decide whether a given contract is one which involves the personal skill of the bankrupt. The assignees have been held the proper plaintiffs in an action on an agreement to employ the bankrupt as foreman; (*g*) but in this case the contract was broken before the bankruptcy. Where an order was given to build a house, and the builder, after beginning to build it, became bankrupt,
[197] and the house was afterwards completed by the assignees, they were held entitled to recover under the order; (*i*) but it is questionable whether the trustee has a right to complete a contract of this kind made with the bankrupt. (*k*)

It has been suggested that where a contract made with the bankrupt has been broken before the bankruptcy, the assignees or trustee can in all cases sue on the contract, whatever its nature, "that is to say, the question whether a right of action actually vested in the bankrupt prior to the bankruptcy, in respect of a contract determined, passes to the assignees, is not affected by the consideration whether the contract, if it had not been determined, but had remained open and in fieri at the time of the bankruptcy, would have passed to the assignees, and could have been performed by them. . . . . The right to recover wages, salary, or commission [due to the bankrupt at the time of the bankruptcy] would pass to the assignees as part of the personal estate, without regard to the con-

(*g*) Ibid., 579.
(*i*) Whitmore v. Gilmour, 12 M. & W. 808, 810.
(*k*) Knight v. Burgess, 33 L. J. 727, Ch.

sideration whether the contract or services had had relation to the personal skill or labor of the bankrupt, or any confidence reposed in him, or whether the contract could have been performed by the assignees"; (*l*) and this view, even if doubtful under the former Bankruptcy Acts, is in strict conformity with the terms of the Bankruptcy Act, 1869, by which the bankrupt's things in action (*m*) vest in the trustee. The trustee, therefore, is apparently the right person to sue, even on contracts involving the personal skill of the bankrupt, which are broken by the other party before the bankruptcy.

RULE 35.—For the breach of any contract [198] made with the bankrupt during the continuance of the bankruptcy (in which the bankrupt has both a legal and a beneficial interest), either the trustee may sue or the bankrupt may sue, if the trustee does not interfere. (*n*)

The remarks as to the right of the trustee to sue on contracts made with the bankrupt before bankruptcy apply mutatis mutandis to his right (which is undoubted) to sue on contracts made with the bankrupt during the continuance of the bankruptcy. (*o*)

The right of a bankrupt to sue on contracts made with him during the continuance of the bankruptcy was, under the former acts, fully established. Thus, where a bill of exchange was endorsed to an undischarged bankrupt, it was held that he could, if his assignees did not interfere, sue upon it, and that a plea simply alleging that the bill was endorsed to him after bankruptcy, and not alleging that the assignees interfered, was bad. (*p*)

(*l*) Beckham v. Drake, 2 H. L. C. 632, 633, per WILDE, C. J.

(*m*) Bankruptcy Act, 1869, s. 4.

(*n*) Herbert v. Sayer, 5 Q. B. 965; Kitchen v. Bartsch, 7 East, 53; Morgan v. Knight, 33 L. J. 168, C. P.; 15 C. B., N. S., 669; 2 Griffith & Holmes, Bankruptcy, 934.

(*o*) Bankruptcy Act, 1869, ss. 4, 15.

(*p*) Herbert v. Sayer, 5 Q. B. 965; esp. judgment of Ex. Ch. 981. Compare Jackson v. Burnham, 22 L. J. 13, Ex.; 8 Ex. 172.

The cases which establish this right were decided under the older Acts, but they appear in principle to apply to the present Bankruptcy Act. It may, therefore, in the absence of decisions, be assumed that a bankrupt can, if the trustee does not interfere, sue on contracts made with him during the continuance of the bankruptcy. The interference of the trustee affords an answer to the action, (*q*) and the money recovered is the property of the trustee.

[199] *Exception* 1.—Contracts, the breach of which involves injury to the person or the feelings of the bankrupt. (*r*)

Exception 2.—Contracts to pay for the personal labor of the bankrupt performed after his bankruptcy.

The trustee, though entitled to sue for money due to the bankrupt, at the time of the bankruptcy, for his personal labor, (*s*) can not sue for the price of the bankrupt's personal labor performed after his bankruptcy. (*t*) An action for it must be brought by the bankrupt himself, and the amount recovered is, apparently, recovered to the bankrupt's own use. (*v*)

The expression "personal labor" must be taken in a restricted sense. Where a trade was carried on by a bankrupt by the leave of the assignees for the benefit of the estate, the right of action on the bankrupt's contracts passed to the assignees. (*x*) In one case, where the plaintiff was an uncertificated bankrupt, and his business was that of a furniture broker, and the debt sued for was contracted in the removal of the defendant's goods, for which

(*q*) Herbert v. Sayer, 5 Q. B. 965; Kitchen v. Bartsch, 7 East, 53.

(*r*) See *ante*.

(*s*) Beckham v. Drake, 2 H. L. C. 633.

(*t*) Chippendale v. Tomlinson, 7 East, 57, note (*g*); Silk v. Osborn, 1 Esp. 140; Crofton v. Poole, 1 B. & Ad. 568; Beckham v. Drake, 2 H. L. C. 604.

(*v*) The expressions of BULLER, J., in Kitchen v. Bartsch, 7 East, 57, suggest that a large sum of money recovered by the bankrupt for his personal labor, might be held by him for his trustee; and the effect of the Bankruptcy Act, 1869, ss. 4, 15, must be considered.

(*x*) Elliot v. Clayton, 20 L. J. 217, Q. B.

the plaintiff had procured vans, and employed assistants, the court held that the demand was not a demand for mere personal labor, so as to bring the case within this exception. (*y*) A bankrupt has, however, been allowed to recover under this exception for money lent and materials supplied. (*z*)

Set-off. (*a*)—A defendant's right to a set-off in an action by a bankrupt's trustee depends in part upon [200] the ordinary statutes of set-off, (*b*) and in part upon the Bankruptcy Act, 1869, s. 39, which re-enacts and extends the Bankruptcy Act, 1849, s. 171. It is, therefore, more extensive than the right possessed under the general statute of set-off. In other words, a defendant in an action by a bankrupt's trustee may, in general, set-off the same claims which he might set-off in an ordinary action by the bankrupt had he remained solvent, and also other claims which could not be made the subject of a set-off in an ordinary action. (*c*)

The following points as to the special right of set-off as against a bankrupt's trustee should be noted.

1st. Debts can be set-off against debts as in the case of an ordinary action.

2ndly. Mutual credits can be set-off.

The term "mutual credits" includes "all credits" which must of their nature terminate in debts, and this "means, not, as has been contended in some cases, credits which must ex necessitate rei terminate in debts, but

(*y*) Crofton v. Poole, 1 B. & Ad. 568.

(*z*) Silk v. Osborn, 1 Esp. 140; Evans v. Brown, Ibid., 170.

(*a*) "Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving, or claiming to prove, a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings; and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had at the time of giving credit to the bankrupt notice of an act of bankruptcy committed by such bankrupt, and available against him for adjudication." Bankruptcy Act, 1869, s. 39. Compare with this, Bankruptcy Act, 1849, s. 171

(*b*) 2 Geo. II., c. 22, s. 13.

(*c*) See 1 Griffith & Holmes, Bankruptcy, 2nd ed., 628.

credits which have a natural tendency to terminate in debts, not in claims differing in nature from a debt." (*d*) Thus a claim for a loss on a policy of insurance is a credit within the statute, though not within the general statutes of set-off. (*e*)

[201] 3rdly. All debts and demands may be set-off which are proveable against the bankrupt's estate. (*f*)

4thly. Notice of an act of bankruptcy is the point at which the right of set-off terminates, *i. e.*, the defendant can not set-off credit which he has given to the bankrupt after notice of an act of bankruptcy, though he may set-off credit given after the act of bankruptcy itself, if he did not know of it. (*g*)

5thly. Demands, in respect of which set-off is claimed, must be strictly in the same right.

In an action by the trustee of a bankrupt upon a cause of action accruing to him as trustee since the bankruptcy, unless it be one which arose out of a credit given by the bankrupt before the adjudication of bankruptcy, and before notice of an act of bankruptcy, (*h*) the defendant can not set-off debts due to him from the bankrupt before bankruptcy. (*i*) Nor does the statute apply where the bankrupt sues as a trustee. (*k*)

RULE 36.—Actions on contracts made with the bankrupt after the "close of the bankruptcy" (*l*) must be brought by the bankrupt.

(*d*) Rose v. Hart, 2 Smith, L. C., 6th ed., 267, 276.

(*e*) Beckwith v. Bullen, 27 L. J. 162, Q. B.; 8 E. & B. 683; Bullen, Pleadings, 3rd ed., 681.

(*f*) Rose v. Hart, 2 Smith, L. C., 6th ed., 267, 285. This, at least, was the case under the former Bankruptcy Act (Bankrupt Law Consolidation Act, 1849, s. 71). The language of the Bankruptcy Act, 1869, s. 39, does not make it clear whether all claims that are proveable are the subject of set-off. Proveable claims of the nature of damages must at any rate be assessed before they can be set-off. (Ibid.) See as to proveable claims, Chapter XVII.

(*g*) Rose v. Hart, 2 Smith, L. C., 6th ed., 267, 275; Dickson v. Cass, 1 B. & Ad. 343; Hawkins v. Whitten, 10 B. & C. 217.

(*h*) Hulme v. Muggleston, 3 M. & W. 30; Bittleston v. Timmins, 1 C. B. 389.

(*i*) Wood v. Smith, 4 M. & W. 522; Bullen, Pleadings, 3rd ed., 682.

(*k*) Boyd v. Mangles, 16 M. & W. 337.

(*l*) Bankruptcy Act, 1869, s. 47.

When the whole property of the bankrupt has been realized for the benefit of his creditors, or certain other events, more particularly described in the [202] Bankruptcy Act, have taken place, the Court may make an order that the bankruptcy has closed, and the bankruptcy is deemed to have closed at and after the date of such order. (*l*)

After the close of the bankruptcy, (*m*) the bankrupt may obtain an order of discharge, or he may not obtain such an order, and thus, even after the close of the bankruptcy remain an undischarged bankrupt. (*n*)

A bankrupt who has obtained his discharge, has the same rights as regards future contracts as a person who has never been bankrupt, and is, therefore, of course, the person to sue on contracts made with himself. An undischarged bankrupt has also (it would appear), after the close of the bankruptcy, the same right to make contracts as a person who has never been bankrupt, and no right to sue on such contracts vests in the trustee, or in any person representing the trustee. (*o*)

Rule 37.—All the trustees must join in suing.

"The creditors may, if they think fit, appoint more persons than one to the office of trustee, and where more than one are appointed, they shall declare whether any act required or authorized to be done by the trustees, is to be done by all or any one or more of such persons; but all such persons are in this Act (*p*) included under the term trustee, and shall be joint tenants of the property of the bankrupt." (*q*)

All the trustees, therefore, it would seem, must join in an action for breach of contract. (*r*) That is to say the

(*l*) Bankruptcy Act, 1869, s. 47.
(*m*) And in some cases before it. Bankruptcy Act, 1869, s. 48.
(*n*) Bankruptcy Act, 1869, s. 54.
(*o*) Ibid., s. 15.
(*p*) *I. e.*, the Bankruptcy Act, 1869.
(*q*) Ibid., s. 83, cl. 1.
(*r*) Snelgrove v. Hunt, 2 Stark. 424; Jones v. Smith, 1 Ex. 831.

non-joinder of a trustee, has the ordinary effect of
[203] the non-joinder of a plaintiff in an action for breach of contract. (*s*)

RULE 38.—On the removal, retirement, death, &c., of a trustee, his rights pass to and vest in his successor.

A trustee may from various causes, *e. g.*, removal, death, bankruptcy, &c., cease to be a trustee. (*t*) In this case the property passes to and vests in his successor; and if for any cause there is no trustee acting during the continuance of the bankruptcy, the registrar of the court for the time being having jurisdiction in the bankruptcy, acts as such trustee, (*u*) and the bankrupt's property vests in the registrar. (*v*)

Death or removal during action.—The death, removal, &c., of a trustee during the progress of an action does not cause the action to abate. (*w*)

RULE 39.—The bankruptcy of a plaintiff does not cause the action to abate.

Formerly, if a plaintiff became bankrupt during the course of action, the vesting of his rights of action in the assignees could be pleaded in bar to the further maintenance of the action, and the action could thus be put an end to. Now, however, bankruptcy can not be pleaded, unless the trustee declines to continue the action,
or else, though not declining to continue it, declines
[204] to give security for costs. (*x*) If the trustee gives

(*s*) Rule 13.

(*t*) Bankruptcy Act, 1869, s. 83, cl. 1–6.

(*u*) Ibid., cl. 3.

(*v*) Ibid., cl. 6.

(*w*) This was expressly provided under Bank. Law Con. Act, 1849, s. 157. Compare Bankruptcy Act, 1869, s. 83, cl. 7.

(*x*) C. L. P. Act, 1852, s. 112. It should be noticed that C. L. P. Act, 1852, ss. 135–142, have no application to actions commenced after bankruptcy. Stanton v. Collier, 3 E. & B. 274; 23 L. J., 116, Q. B.

security for costs, and proceeds with the action, it should be carried on in the name of the bankrupt up to final judgment. (*y*)

RULE 40.—If an action be brought by the bankrupt in cases in which the trustee must sue, or by the trustee in cases in which the bankrupt must sue, the error is fatal.

If a bankrupt sues, *e. g.*, for a debt owing to him before bankruptcy, or his trustee sues, *e. g.*, on a contract in which the bankrupt has no beneficial interest, the action must fail, for in either case it is brought by a plaintiff who has no cause of action; and the error is one which does not admit of amendment, (*z*) since the law does not permit the substitution of a right for a wrong plaintiff. (*a*)

(*y*) Day, C. L. P. Act, 3rd ed., 123

(*z*) See Chapter XXXIV.

(*a*) Liquidation by Arrangement. Under the Bankruptcy Act, 1869, there may take place instead of a bankruptcy a liquidation by arrangement. Under such an arrangement a trustee is appointed, whose powers and duties are thus defined:—The trustee under a liquidation shall have the same powers and perform the same duties as a trustee under a bankruptcy, and the property of the debtor shall be distributed in the same manner as in a bankruptcy; and with the modifications hereinafter mentioned, all the provisions of this Act shall, so far as the same are applicable, apply to the case of liquidation by arrangement in the same manner as if the word 'bankrupt' included a debtor whose affairs are under liquidation, and the word 'bankruptcy' included liquidation by arrangement; and, in construing such provisions, the appointment of a trustee under liquidation shall, according to circumstances, be deemed to be equivalent to, and a substitute for, the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy." Bankruptcy Act, 1869, s. 125, cl. 7.

CHAPTER X.

EXECUTORS, ADMINISTRATORS, AND HEIRS.

RULE 41.—The personal representatives of a deceased person (*i. e.*, his executors or administrators) can sue on all contracts of whatever description made with him, whether broken before or after his death.

The rights and liabilities of a deceased person are represented by two classes of representatives. The first class consists of his personal representatives, *i. e.*, his executor or executors, or administrator or administrators. (*a*) The second class consists of real representatives, *i. e.*, the heir or devisee. The personal representatives entirely represent the deceased, and possess, speaking generally, all his rights, and are liable for all his responsibilities, in so far as they have assets (*i. e.*, to the amount of his personal estate), the rights and liabilities of which they in fact represent. (*b*) Co-executors (or co-administrators) have a joint interest, and incur joint liabilities and stand in many respects in the position of partners. The real representative, *i. e.*, the heir or devisee, represents the deceased less completely than does an [206] executor. The heir or devisee represents in fact the rights and liabilities of the real estate. He can sue only in respect of injuries to it, and is liable only in

(*a*) The powers and liabilities of executors and administrators are, speaking generally, the same. The executor is a representative appointed by the will; the administrator is the representative generally of an intestate, and appointed by letters of administration issued by the Court of Probate. See as to an administrator cum testamento annexo, 1 Williams, Executors, 6th ed., 490.

(*b*) Compare 2 Williams, Executors, 6th ed., 1529, and following.

so far as the real estate has come to him, and as it is bound.

The personal representatives, as representing the personal estate of the deceased, may sue on all contracts with him, whether broken in his lifetime or subsequently to his death, the breach of which occasions damage to the personal estate. (*c*)

"With respect to such personal actions as are founded upon any obligation, contract, debt, covenant, or other duty, the general rule has been established from the earliest times, that the right of action on which the testator or intestate might have sued in his lifetime survives his death, and is transmitted to his executor or administrator. (*d*) Therefore it is clear that an executor or administrator shall have actions to recover debts of every description due to the deceased, either debts of record, as judgments, statutes, or recognizances; or debts due on special contracts, as for rent; or on bonds, covenants, and the like, under seal; or debts on simple contracts, as notes unsealed, and promises not in writing either express or implied." (*e*) Again, "it is clear that in many cases an action on which the deceased himself could not have sued may accrue to the executor or administrator in his own time, upon a contract made with the testator or intestate in his lifetime," (*f*) or, in other words, that he can sue on contracts made with the deceased but broken after his death.

Thus, if X. enters into a contract with M. by deed, or if X. gives a bill to M., or contracts with M. by word of mouth, or does any act which gives M. a right to sue him in the form of an action for breach of con- [207] tract, though the act may partake of the nature of a tort, (*g*) A., the executor of M., may sue X., though the

(*c*) Raymond v. Fitch, 2 C. M. & R. 596, 597, judgment of TINDAL, C. J.; Broom, Maxims, 4th ed., 870, 871.

(*d*) The right of executors to sue is extended to administrators by statute, 31 Edw. III., s. 1, c. 11.

(*e*) 1 Williams, Executors, 6th ed., 739, 740.

(*f*) Ibid., 827.

(*g*) See *ante*; Knights v. Quarles, 2 B. & B. 102; 4 Moo. 532. See Alton v. Midland Rail. Co., 19 C. B., N. S. 213; 34 L. J. 292, C. P

cause of action accrued during M.'s life. and, A. may also sue X., supposing the contract made with M. was not broken until after M.'s death, and thus the cause of action (*h*) did not arise during M.'s life. The personal representatives, further, so completely represent the deceased, that (generally speaking) an executor or administrator may sue on a contract in which he is not named. Thus, if money be made payable to A. without naming his executor, yet his executor or administrator can have an action for it. So, if money be payable to A. or his assigns, his executor may sue for it, as he is assignee at law. (*i*)

The executor or administrator is the only representative of the deceased that the law will regard in respect of his personalties, and no words introduced into a contract or obligation can transfer to another his exclusive right of representation. Thus A., as administrator of M., brought an action upon a promise made to M. to pay upon M.'s marriage, "to M., his heirs or executors," fifty guineas, and the action was held to be rightly brought, although the plaintiff did not show that the money had not been paid to the intestate's heir; the ground of the decision was that by the law all personalties and rights to personalties are given to the executors or administrators, as all realties and rights to realties are given to the heir; the executors or administrators being a man's representatives in respect of his personalties in like manner as the heir in respect of his realties; (*j*) and so, if X. binds himself to M. to pay a certain sum of money to M. or
[208] his heirs, M.'s executors or administrators, and not his heirs, have a right to the money, and should sue for it. (*k*) So, again, an executor, &c., is the person to sue upon a promise made to the deceased for the exclusive benefit of a third party. (*l*)

(*h*) See *ante*.

(*i*) 1 Williams, Executors, 6th ed., 742; Com. Dig., Administrator (B. 13).

(*j*) Devon v. Pawlett, 11 Vin. Abr. 133, pl. 27; 1 Williams, Executors, 7th ed., 740.

(*k*) S. P. Fitz., N. B., 120, I., 9th ed.; 1 Williams, Executors, 6th ed., 741.

(*l*) Ibid., 759, 760; Rules 10, 11.

Exception 1.—Contracts, the breach of which occasioned merely personal suffering to the deceased.(*m*)

No one can sue for a breach of contract where the damage occasioned consisted entirely in the personal suffering of the deceased. Thus no action can be brought for a breach of promise of marriage to the deceased, (*n*) "for executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." (*o*) "So with respect to injuries affecting the life and health of the deceased: all such as arise out of the unskillfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney; generally speaking, no action can be sustained by the executor or administrator on a breach of the implied promise, by the person employed to exhibit a proper portion of skill and attention: such cases being, in substance, actions for injuries to the person." (*p*)

If a breach of contract affects, not only the person of the deceased, but his personal estate also, the executor can sue for the consequential damage. (*q*) Where A., the administrator of M., sued X. for negligence as attorney of M. in investigating the title of certain lands [209] which were to be conveyed to M., in consequence of which M. took an insufficient title, whereby his personal estate was injured, the action was held to lie, and the court held "that it made no difference in this case whether the promise was express or implied, the whole transaction resting on a contract that though perhaps the intestate might have brought case, (*r*) or assumpsit, (*s*)

(*m*) Conf. *ante*.

(*n*) Chamberlain v. Williamson, 2 M. & S. 408.

(*o*) Ibid., 415, judgment of ELLENBOROUGH, C. J.

(*p*) 1 Williams, Executors, 6th ed., 753.

(*q*) Broom, Maxims, 4th ed., 871, 872; 1 Williams, Executors, 6th ed., 751, 752.

(*r*) *I. e.*, an action for tort, see *ante*.

(*s*) *I. e.*, an action for breach of contract, see *ante*.

at his election, assumpsit being the only remedy for the administrator it was very necessary that the action should be maintained. . . . It was further observed, that if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, though it was clear that he, in his lifetime, might at his election (*t*) sue the coach proprietor in contract or in tort, it could not be doubted that his executor might sue in assumpsit for the consequences of the coach proprietor's breach of contract." (*u*)

Exception 2.—Contracts limited to the lifetime of the deceased.

On a contract, expressly limited to the lifetime of the deceased, it is clear that no action can be brought by (or against) (*v*) his representatives for any alleged breach of it after his death.

But there exist also contracts which are held as a matter of law to be determined by the death of either party. The ground on which they are held so de-
[210] terminable is, that they are considered to be obviously "founded on personal considerations," *i. e.*, made with reference to the personal qualities of the parties. (*x*)

Under the head of personal contracts fall most obviously undertakings to do some act, *e. g.*, write a book,

(*t*) See *ante*.

(*u*) Knights v. Quarles, 2 B. & B. 104, 105. An action, might, perhaps, be brought even for a breach of promise of marriage, if the executors could allege injury to the deceased's personal estate as a consequence of the breach of promise. See Chamberlain v. Williamson, 2 M. & S. 408; Beckham v. Drake, 8 M & W. 846, 854, compared with Alton v. Midland Rail. Co., 34 L. J. 292, C. P.; 19 C. B., N. S. 213. See as to actions by executors where the deceased has been killed through negligence of the defendant, Chapter XXIV.

(*v*) Chapter XVIII.

(*x*) The principle applies to the liabilities, no less than the rights of executors, and can therefore be illustrated as well by cases of actions brought against executors as of actions brought by them.

paint a picture, and, it is said, build a lighthouse, (*y*) the performance of which depends upon the skill or talent of a particular person.

All contracts, again, of apprenticeship fall under the description of personal contracts. On the death of the master, the apprentice is, unless there be something special in the agreement, (*z*) released from the obligation to serve, and the executors are released from the obligation to teach, though not, it should be observed, from covenants to maintain him. (*a*)

All contracts of agency are included within the same class. Thus, where A. is employed as an agent for the sale of an article, he can not, on the death of his employer, sue the latter's representatives for work done as agent after the employer's death. (*b*)

So again, where A. was hired by M. to serve as farm bailiff at weekly wages, and received among other advantages a residence in a farm house, and it was part of the contract that the service should be determinable by six months' notice, or payment of six months' wages, it was held that M.'s representative was not bound either to continue A. in her service, or to pay him six month's wages. (*c*)

Exception 3.—Covenants real broken during the life- [211] time of the deceased.

'Covenants real," as the term is here used, (*f*) mean

(*y*) 2 Williams, Executors, 6th ed., 1593, n. (*t*). Contrast the agreement to build a house, which it is said, a man's executors are bound to perform (Quick v. Ludborrow, 3 Bulst. 30).

(*z*) Cooper v. Simmons, 7 H. & N. 707 ; 31 L. J. 138, M. C.

(*a*) 2 Williams, Executors, 6th ed., 1631.

(*b*) Companari v. Woodburn, 15 C. B. 400 ; 24 L. J. 13, C. P.

(*c*) Farrow v. Wilson, L. R. 4, C. P. 744. Though a contract is limited to the lifetime of the deceased, his representatives may sue and be sued for breaches committed before his death (see Stubbs v. Holywell Rail. Co., L. R. 2, Ex. 311 ; 36 L. J. 166, Ex.), and a contract, which appears to be prima facie a personal one, may be made by its express terms to give rights to, or impose liabilities upon, the representatives of the deceased (Cooper v. Simmons, 7 H. & N. 707 ; 31 L. J. 138, M. C.).

(*f*) It may be employed as including all covenants which run with the land. Of these, those which affect the freehold descend to the real representatives,

"covenants which both run with the land and descend to the heir or devisee," *i. e.*, covenants which affect the freehold. These covenants will go to the heir not only when he is not named, but where the covenant is made with the covenantee and his executor; (*g*) and the heir is clearly the person to sue for any breach of such covenants committed after the death of the deceased.

Where, in short, the benefit of covenants annexed to an estate in land, (*h*) *e. g.*, for title, to repair, and the like, is assigned by law to the real representative, he must sue for breaches committed after the death of the deceased, and the sole question is whether the personal or the real representative is the right plaintiff in an action for breaches committed during the lifetime of the deceased. The rule on this point seems to be, (*i*) that if there has been a formal breach of such covenants during the ancestor's lifetime, but the substantial damage has taken place after his death, the real and not the personal representative is the proper plaintiff in an action on the covenant. "Accordingly where an executor brought an action upon covenants for title contained in a conveyance of land to the testator, charging breaches in the testator's lifetime, but not showing any damage to the personal estate, [212] it was held that he could not recover; (*j*) and the devisee of the same land having brought an action for the same breaches of the same covenants, it was held that he was entitled to maintain the action, and to recover in respect of the deterioration in the value of the land by reason of the defective title." (*k*) The executor, on the other hand, may sue for a breach of a covenant real, though committed in the lifetime of the covenantee,

those which affect chattel interests, to the personal representatives. Thus, if a feoffment be made in fee, and the feoffor covenant to warrant the land to the feoffee and his heirs, the heir of the feoffee is the person to take advantage of the covenant (Touch. 178).

(*g*) 1 Williams, Executors, 6th ed., 753, 754

(*h*) See *ante*.

(*i*) Raymond v. Fitch, 2 C. M. & R. 596, judgment of Lord ABINGER, C. B.; Kingdon v. Nottle, 1 M. & S. 355.

(*j*) Kingdon v. Nottle, 1 M. & S. 355.

(*k*) Leake, Contracts, 639; and see Kingdon v. Nottle, 4 M. & S. 53.

in respect of any damage caused thereby to the personal estate. (*l*)

On a "collateral covenant," by which is here meant a covenant which, though it may concern the realty, does not run with the land, the executor or administrator must sue. Thus on a covenant in a lease not to cut down trees (the trees being excepted from the demise, and the covenant therefore being collateral and not running with the land), the executor was held entitled to sue for a breach committed during the testator's lifetime, and in such a case no special damage to the personal estate need be alleged. (*m*)

Many covenants, moreover, which, in the most general sense of the words, "run with the land," descend, not to the heir, but to the executor, that is to say, they are not "covenants real." These covenants are not collateral, for they are annexed to an estate in land, but the estate, not being a freehold, does not descend to the heir, but to the executor or administrator. Thus where the deceased is entitled to a reversion for years, and a covenant has been made with him as lessor, the executor or administrator is the only party capable of suing on such a covenant; (*n*) and the executor of a tenant for years is expressly within the statute 32 Hen. VIII. c. 34, [213] and may maintain an action of covenant against the assignee of the reversion. (*p*)

The effect and extent of this exception from the general rule may be seen from the following examples:—

M., the deceased, is possessed of a freehold, and X. has covenanted with him for title. The covenant is broken after M.'s death; the heir is the only person who can sue for the breach. Suppose, on the other hand, the covenant to be broken before M.'s death, the right per-

(*l*) Leake, Contracts, 639, 640; Kingdon v. Nottle, 1 M. & S. 355, 364; 4 Ibid., 53, 57; Knights v. Quarles, 2 B. & B. 102, 105; 1 Williams, Executors, 6th ed., 757.

(*m*) Raymond v. Fitch, 2 C. M. & R. 588. Compare Ricketts v. Weaver, 12 M. & W. 718.

(*n*) Mackay v. Mackreth, 2 Chit. 461.

(*p*) 1 Williams, Executors, 6th ed., 761.

son, prima facie, to sue is the heir, but the executor can sue if he can show damage resulting to the personal estate of M.

Again, M. is possessed of an estate for years, and X. has covenanted with him for title, and the covenant is broken both before and after the death of M. The executor is the only person who can sue.

Lastly, X. has entered into a covenant with M., the deceased, which is not of a kind to run with the land; the executor is the only person who can sue for a breach of such covenant, whether committed before or after M.'s death.

Lessor and Lessee.

1st. For arrears of rent due before the death of the lessor, the executor must in all cases sue, whatever the nature of the lessor's interest in the land. (*q*)

2d. Where rent becomes due after the death of the lessor, the proper party to sue for it is the person to whom the lessor's interest in the land, or, in other words, the reversion, passes. If the reversion is a chattel interest, *e. g.*, a lease for years, the executor should sue, and so, too, where no reversion remains with the lessor. If, on the other hand, the reversion is a freehold interest, *e. g.*, an estate for lives, the heir must sue.

3d. Where the lessor dies before the rent for any [214] given period has become actually due, *i. e.*, during the period intervening between one rent day and another, though the heir is, if the reversion goes to him, the proper person to sue for the whole of the rent when it becomes due, yet the rent when recovered is, under 4 Will. IV., c. 22, s. 2, apportioned between the executor and the heir.

The effect of the statute is that the person to whom the reversion passes, who before the Act would have been entitled to the whole of the rent, still sues for it. The executor, &c., however, can recover from him the por-

(*q*) Ibid., 771.

tion of the rent due for the period preceding the lessor's death.

The statute applies only to leases granted after its passing.

Exception 4.—Contracts on which the deceased must have sued jointly with other persons. (*r*)

SUBORDINATE RULE 1.

An executor can commence an action before probate; but an administrator can not commence an action before letters of administration granted to him.

The interest of an executor in the estate of the deceased is derived exclusively from the will, and vests in the executor from the moment of the testator's death, (*s*) and his title dates or relates back to the date of the death. An administrator, on the other hand, derives his authority entirely from the appointment of the court; (*t*) and no right of action in general accrues to him until he has sued out letters of administration. One consequence of this is that an executor can commence an action before probate. It is true that he can not maintain an action without obtaining probate, (*u*) but he may advance an [215] action as far as that point where the production of probate becomes necessary, and it will be sufficient if he obtains probate in time for that exigency. (*y*) He can issue a writ, declare, &c., without taking out probate, and can support his declaration by showing at the trial that he has proved the will. (*z*) But if an administrator commences

(*r*) See Rule 16 for explanation.

(*s*) Williams, Executors, 6th ed., 595, 601.

(*t*) Ibid., 389, 596.

(*u*) See, however, as to actions grounded on actual possession, Chapter XIX.

(*y*) 1 Williams, Executors, 6th ed., 296.

(*z*) If, however, an executor commences an action before probate, the defendant may apply to the court to stay proceedings until probate is taken out and notice thereof given to the defendant (Webb v. Atkins, 14 C. B. 401; 23 L. J. 96, C. P.).

an action before letters of administration are granted, he must fail, for at the time the action was brought he had no right of action, and can not support his claim at the trial by showing that he sued out letters of administration after the commencement of the action. (*a*)

SUBORDINATE RULE II.

On the death of a plaintiff the action can be carried on by his executor or administrator.

The death of a plaintiff does not now, as it did formerly, cause an action to abate, (*b*)[1] or put an end to it.

(*a*) 1 Williams, Executors, 6th ed., 389, 390.

The representative of a foreigner must, if he sues in a representative character, obtain probate or letters of administration in order to maintain an action in this country (Vanquelin v. Bouard, 15 C. B., N. S., 341; 33 L. J. 78, C. P.).

(*b*) C. L. P. Act, 1852, s. 135.

[1] 4 Id.; Emmerson v. Blakely, 2 Abb. App. Dec. 22; and see § 121, N. Y. Code of Procedure; and, under the provision of this section, that, after verdict in an action for a wrong, the action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action survives, an action for a purely personal wrong does not abate by the death of a plaintiff, after a verdict in his favor. The verdict becomes property which passes to the representatives of the deceased, as a judgment would at common law. If set aside after the death of the party, the representative may prosecute such appeal as the law allows, for the purpose of having it restored. He is not, in such a case, prosecuting an action for the original tort, but is endeavoring to save and restore the verdict. The right to appeal from the decision granting the new trial, and to proceed for the purpose of restoring the verdict, can be held to pass to the personal representatives, on the same principle upon which the right to enforce the verdict passes to them. Wood v. Phillips, 11 Abb. Pr. (N. S.) 1. Under the Ohio Civil Code, § 399, which provides that "no action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel or slander, . . . which shall abate by the death of the defendant," an action for slander does not abate by the death of the plaintiff during its pendency Alpin v. Merton, 21 Ohio St. 536.

If the cause of action is one which survives to the representatives, that is to say, if it is one on which the executor or administrator might commence an action, the executor, &c., may continue it by taking the proceedings pointed out by the Common Law Procedure Act, 1852, s. 137.[1]

Almost all rights of action grounded on contract pass, as appears from the foregoing rule, to the personal representative, who, therefore, may continue such actions when commenced by the deceased.

He can not (it is conceived) continue an [216] action for a breach of promise of marriage, or perhaps on a covenant real, where no actual damage has accrued from the breach of the covenant, since such causes of action do not pass to him. (*c*)

If, however, the plaintiff die between verdict and judgment, the executor, &c., may enter up judgment even though the cause of action would not have survived. (*d*)

RULE 42.—An executor or administrator :—

1. Must sue in his representative character on all contracts made with the deceased.[2]

2. May sue either in his representative or in his personal character on contracts made with him as executor after the death of the deceased.[3]

(*c*) See Exceptions 1 and 3, *ante*.

(*d*) Palmer v. Cohen, 2 B. & Ad. 966; Kramer v. Waymark, L. R. 1, Ex. 241. See generally, Day, C. L. P. Acts, 3rd ed., 115-121.

[1] If a suit is brought in the name of a nominal party, it is not necessary to revive it (in case of his death) in his personal representative, but at the suggestion of the death of the nominal party the suit will proceed in the name of the real party. Clark v. Hopkins, 34 Tex. 139.

[2] Cooley v. Brown, 30 Iowa, 470; and see Farnham v. Mallory, 2 Abb. App. Dec. 100; Smith v. Britton, 45 How. Pr. 428.

[3] See Brown v. Lewis, 9 R. I. 497; and under the Mississippi practice, Eckford v. Hogan, 44 Miss. 398; Cool v. Higgins, 23 N. J. Eq. 30.

When the cause of action (*e*) arose wholly or in part in the lifetime of the deceased, the representative must declare in his representative character; (*f*) but where the cause of action arose wholly after the death, the executor may sue as such or not at his option, (*g*) provided that the money to be recovered would be assets of the estate. (*h*)

These principles, applied to actions on contract, produce the following results:—

1st. On all contracts made with the deceased, whether broken before or after his death, an executor or administrator must sue in his representative character. (*i*)

[217] 2nd. When a contract is made with an executor, he may sue either in his own name personally (as being the party contracted with), or in his representative character,[1] if the money to be recovered would be assets of the estate; (*l*) and this he may do not only in cases where the consideration flows from the deceased, but also in cases where the consideration flows directly from himself as executor. Thus an executor may declare as such not only on an account stated with him as executor concerning money due to the testator from the defendant,

(*e*) See *ante*

(*f*) Bullen, Pleadings, 3rd ed., 153; 2 Williams, Executors, 6th ed., 1727.

(*g*) Ibid.

(*h*) Ibid.

(*i*) But see Gallant v. Boutflower, 3 Doug. 34.

(*l*) Bullen, Pleadings, 3rd ed., 153.

[1] Eckford v. Hogan, 44 Miss. 398. An administrator, whether foreign or domestic, may sue in his own name upon a note payable to bearer, even though such note was transferred to his intestate in the latter's lifetime. The mere production of the note, in such action, will entitle him to judgment, and he need not allege, nor if he allege, need he prove the source from which he derived the note. Sandford v. McCreery, 28 Wis. 103. An administrator de bonis non and cum testamento annexo can sue the representatives of his predecessor for assets actually converted. Parrish v. Brooks, 4 Brews. (Pa.) 154; and consult Lathan v. Blakemore, 4 Heisk, 276; Davis v. Fox, 69 N. C. 435.

but also on an account stated with him as executor concerning money due to him as executor, and may maintain an action as executor for money lent by him as executor. So where the testator agreed to do certain work, and died before the work was begun, and the executors did the work, using the testator's materials, and brought an action in their representative character for work and labor done, and goods sold and delivered by them, as executors, it was held that they might recover the value of the materials, and perhaps also for work and labor as executors; (*m*) and so where a coat had been ordered by the defendant of a tailor, and had been cut out and tacked together and tried on during the tailor's lifetime, but was finished and delivered after his death by his administratrix, it was held that she could not sue for the price of the goods as for goods sold and delivered by the intestate, but that the proper form of action was for goods sold and delivered by her as administratrix. (*n*)

An executor or administrator must, when suing as executor, &c., claim the amount due to him according to the facts of the case, as an amount due [218] either to the deceased, or to the plaintiff as executor. Where, for example, a debt is due to M. before his death, A., his executor, must claim it as executor, describing it as a debt due to M. Where, on the other hand, money is due to A. as executor, in consequence of a contract made with A. after the death of M., A. may claim it either in his own name, or as executor; but if he claims it in the latter character, he must describe the money claimed, not as money due to M., but as money due to himself as executor.

Set-off.—1st. In an action by an executor or administrator, as such, for debts due to the deceased, the defend-

(*m*) Marshall v. Broadhurst, 1 C. & J. 403; Edward v. Grace, 2 M. & W. 190.

(*n*) Werner v. Humphreys, 2 M. & G. 853; 10 L. J. 214, C. P. See 1 Williams, Executors, 6th ed., 823–827. If an executor continues to carry on the business of the deceased, and enters into contracts in the course of doing so, it would seem that he can not sue in his representative character, but must sue in his own right. Bolingbroke v. Kerr, L. R. 1, Ex. 222.

ant can set-off debts due to him from the deceased, but can not set-off debts due to him from the executor or administrator in his private capacity.

2nd. In an action by an executor, &c., in his representative character, for debts due to him as executor, after the death of the deceased, the defendant can not set-off debts due from the deceased to the defendant. (*p*)

3rd. In an action for debts by an executor, &c., in his own name, the defendant can not set-off debts due to him from the deceased, but can set-off debts due to him from the plaintiff. (*q*)

SUBORDINATE RULE.

An executor or administrator can not join claims made in his representative with claims made in his personal character.

A., the executor of M., can not in the same action claim debts or damages due to him personally, together with debts, &c., due to him as executor of M. A declaration in which such claims were joined would be wholly
219] bad, or, in other words, demurrable. (*s*) He may, however, join any claims in respect of which the money recoverable would be assets; he may, *e. g.*, claim as executor debts due to M., and debts due to himself as executor of M. (*t*) An executor, when he sues in his own name, can join any claim which he makes as an individual.

RULE 43.—Co-executors (*u*) or co-administrators (*x*) must all join as plaintiffs in an action.

(*p*) 2 Williams, Executors, 6th ed., 1732, 1803; Rees v. Watts, 11 Exch. 410; 25 L. J. 30, Ex. (Ex. Ch); Watts v. Rees, 9 Exch. 698; 23 L. J. 238, Ex.; Scholfield v. Corbett, 11 Q B 779; Tegetmeyer v. Lumley, Willes, 264, n.

(*q*) Bullen, Pleadings, 3rd ed., 153.

(*s*) 2 Wms. Saund. 117 *e*; Bullen, Pleadings 3rd ed., 152; Davies v. Davies, 1 H. & C. 451; 31 L. J. 476, Ex.; 2 Williams, Executors, 6th ed. 1729.

(*t*) Edwards v. Grace, 2 M. & W. 190; Dowbiggin v. Harrison, 9 B. & C 666; Bullen, Pleadings, 3rd ed., 152.

(*u*) 2 Williams, Executors, 6th ed., 895.

(*x*) Ibid., 852.

Co-executors have community of interest in the goods, or personal property, of the deceased, and therefore must all join in suing, even though some be infants (*y*) or bankrupts, (*z*) or have not proved the will. (*a*) And where one of several co-executors is a married woman, she and her husband must join in the action. (*b*)

If one of several executors sues alone, the defendant can take advantage of the error by a plea in abatement only. (*c*)

Exception 1.—Where a contract is made with some of several co-executors only.

If a contract is made with some alone of several co-executors, those only can sue on the contract with whom it is made. Where, for example, A., B., and [220] C. were co-executors, and A. and B. authorized an attorney to receive rents due to the estate, and to give receipts in their name, it was held that C. could not join in an action against the attorney for the money collected. (*c*) Whether in any particular instance a contract was made with some only of several executors, *e. g.*, A. and B., in their individual characters, or with some, *e g.*, A. and B. as agents for the others, and therefore with all of them, is a question of evidence. (*f*)

Exception 2.—Where an executor renounces the executorship.

Under 20 & 21 Vict. cap. 77, s. 79, an executor may renounce probate. When he has done this he can not,

(*y*) Smith v. Smith, Yelv. 130.

(*z*) Compare 1 Williams, Executors, 6th ed., 226, 227

(*a*) Brookes v. Stroud, 1 Salk. 3; 2 Williams, Executors, 6th ed., 894.

(*b*) See *ante*.

(*c*) Cabell v. Vaughan, 1 Wms. Saund., 291 *l*; 2 Williams, Executors, 6th ed., 1725. This is an exception to the general rule, that the non-joinder of a plaintiff in an action ex contractu is a fatal error. See Chapter XXXIV.

(*e*) Heath v. Chilton, 12 M. & W. 632.

(*f*) Broom, Parties, s. 1 3 *a*.

of course, join in any action brought by the other executors.

SUBORDINATE RULE.

One co-executor or co-administrator can not bring an action against another concerning matters connected with the executorship.

Generally speaking, it is clear that one executor can not sue or be sued by his co-executor. (*g*) This is a result of the fact that co-executors are jointly interested in the property of the deceased, and is an exemplification of the general rule, that the same person can not be both plaintiff and defendant. Hence, after the death of one of several executors, his executor can not be sued by the surviving co-executors for a debt due to their testator. (*h*) [1]

Another result is that several executors or administrators can not maintain an action in right of the deceased upon a contract made by the defendant with one of themselves. Hence, to an action by several executors, it was held a good plea in bar that the promises sued [221] upon were made by the defendant jointly with one of the plaintiffs; and Mr. Justice BULLER said, "The promise was made jointly with one of the plaintiffs. How can he sue himself in a court of law? It is impossible to say a man can sue himself." (*k*)

If, nevertheless, a debtor makes his creditor and another his executors, and the creditor neither proves the will nor acts as executor, he may bring an action against the other executor. (*l*)

(*g*) 2 Williams, Executors, 6th ed., 895. Rule 5.
(*h*) Ibid., 895.
(*k*) Moffat v. Van Millingen, 2 B. & P. 124, note (*c*); 1 Williams, Executors, 6th ed., 853, 854.
(*l*) 2 Williams, Executors, 6th ed., 276.

[1] But an administrator debonis non and cum testamento annexo can sue his predecessor's representatives for assets actually converted. Parrish v. Brooks, 4 Brews. 154.

RULE 44.—On the death of a co-executor or co-administrator, his rights of action pass to the survivors, and ultimately to the last survivor.

This is a mere illustration of the general rule as to the effect of death on persons who have a joint right of action on a contract. (*m*)

RULE 45.—The executor of a sole or of a sole surviving executor represents the original testator; but the administrator of an executor does not represent the testator, nor does the administrator of an administrator, or the executor of an administrator represent the original intestate.

Suppose M. to be a testator, and A. his executor.

On the death of A., A.'s executor represents M. But if A. dies intestate, A.'s administrator does not represent M.

Suppose M. to be an intestate, and A. is his administrator, neither A.'s administrator nor A.'s [222] executor will represent M.

Where an executor dies without proving the will, his executor does not represent the original testator. (*n*)

(*m*) Rule 16.

(*n*) 1 Williams, Executors, 6th ed., 244–246.

CHAPTER XI.

ACTIONS ON CONTRACT.

DEFENDANTS.—GENERAL RULES.

RULE 46.—No person can be sued for a breach of contract who is not a party to the contract. (*a*) [1]

The ground on which one person is liable in an action on contract at the suit of another is, that he has made to the latter person, either directly or indirectly, either expressly or as the result of his acts, such a promise as the law considers binding, and has broken this promise. No one, therefore, who is a stranger to a contract can be sued upon it; or, in other words, no one can be sued for the breach of a promise except the person who has made the promise. (*b*)

The mere fact, therefore, that X. has received a benefit from A., will not, of itself, render X. liable to be sued by A. Thus A.'s voluntary courtesy is not the ground of an action; (*c*) and if A. voluntarily and without any

(*a*) Or who does not incur liabilities as representing an original party to the contract, Rule 10, note (*a*), *ante*.

(*b*) Rule 7.

(*c*) Lampleigh v. Braithwait, 1 Smith, L. C., 6th ed., 139.

[1] See Dutilh v. Coursault, 5 Cranch C. C. 349; Deloach v. Dixon, 1 Hempst. But if the contract is joint and several, the plaintiff must treat it as wholly joint or wholly separate, and must sue all the parties together, or each by himself. Merrick v. Trustees, 8 Gill. (Md.) 59; Minor v. Mechanics' Bank, 1 Pet. 73; Fielden v. Lahens, 9 Bosw. 436. When the promise is implied, the action must follow the consideration, and be joint or several accordingly; but where the action arises on a joint express promise, the action must be joint. Lee v. Gibbons, 14 Serg. & R. (Pa.) 110.

request from X., pays X.'s debts or otherwise relieves him from liability, A. does not thereby render X. liable to be sued by him. (*d*) M. was employed by the defendants, X. and Co., to carry certain goods for them. M. delegated the whole employment to A. (the plaintiff), who carried the goods without any communication with X. and Co. It was held, that A. could not sue X. [224] and Co. for compensation for the work done by him, (*f*) since there was "no privity between the plaintiff and the defendants. There was nothing by which the defendants could conjecture that the plaintiff would be introduced to them: nothing by which they should know that they should ever meet with such a person as the plaintiff. The defendants, must, indeed, know that some persons would be employed under M., ... but there is nothing whereby they ever authorized M. to employ any one person to conduct the whole [business]. . . . . The defendants looked to M. only for the performance of the work, and M. had a right to look to the defendants for payment, and no one else had." (*g*) Nor can one person be made liable to another on a contract to which he does not assent, in consequence merely of that other meaning to deal with him as a contractor. This principle is illustrated by the following case, (*h*) the facts of which appear from the judgment of BRAMWELL, B.

"The admitted facts are, that the defendants sent to a shop an order for goods, supposing they were dealing with [M.]. The plaintiff, who supplied the goods, did not undeceive them. If the plaintiff were now at liberty to sue the defendants, they would be deprived of their right of set-off, as against [M.]. When a contract is made, in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, or where there might be a set-off, no other person can interpose and adopt the contract. As to the difficulty that the defendants need not pay any-

(*d*) See Pownal v. Ferrand, 6 B. & C. 439, 443.
(*f*) Schmaling v. Thomlinson, 6 Taunt. 147.
(*g*) Ibid., 149, judgment of GIBBS, C. J.
(*h*) Boulton v. Jones, 2 H. & N. 564; 27 L. J. 117, Ex.

body, I do not see why they should, unless they have made a contract either express or implied. I decide the case on the ground that the defendants did not know that the plaintiff was the person who supplied the goods, and that allowing the plaintiff to treat the contract [225] as made with him would be a prejudice to the defendants." (*i*)

Though expressions in the judgment cited suggest that, under some circumstances, the plaintiff might have made the defendants liable, although they had no intention of dealing with them, the principle of the case seems to be, that "if a man goes into a shop and makes a contract, intending it to be with one particular person, no other person can convert that into a contract with him." (*k*) "It is a rule of law, that if a person intends to contract with A., B. can not give himself any right under the contract." (*l*)

The following rules are applications to the different classes of contracts, of the principle that no one can be sued on a contract who is a stranger to it.

Rule 47 fixes who is the person by whom a simple contract is to be considered made, or, in other words, who is the person who is to be sued for the breach of a simple contract.

Rule 48 fixes who is the person by whom a contract by deed is to be considered made, or, in other words, who is the person who is to be sued for the breach of a contract by deed, *i. e.*, a covenant. (*m*)

RULE 47.—The person to be sued for the breach of a simple contract is the person who promises or who allows credit to be given to him.[1]

(*i*) Boulton v. Jones, 2 H. & N. 566.

(*k*) Ibid., judgment of MARTIN, B.

(*l*) Ibid., 565, judgment of POLLOCK, C. B. Compare Hardman v. Booth, 1 H. & C. 803; 32 L. J. 105, Ex.

(*m*) All the real or apparent exceptions to Rule 46 are exceptions to Rule 47, and are considered under that head.

[1] See Hartzell v. Saunders, 49 Mo. 433.

To constitute a simple contract there must be a promisor, a promisee, and a consideration. (*n*) But, though there must exist a consideration, it is not [226] necessary in order to bind the promisor that the consideration should be anything which, in the ordinary use of the word, benefits the promisor. Thus, if X. promise A. to pay him £100 a year in consideration that A. will marry M., the promise is binding upon X., and A., if he marries M., may sue X. for the non-payment of the £100. (*o*) If X. promise A. to pay for goods to be supplied by A. to M., X. is liable to be sued by A. for the price of the goods, and M. is not liable.

When a simple contract is wholly in writing, the contract itself points out who it is who promises, and who, therefore, is to be sued for a breach of the agreement. But the contract, though it points out one person who is liable, need not point out the only person who is liable; for when a contract is simply in writing (*i. e.*, not under seal), though the laws of evidence do not allow it to be shown that X., who on the face of the instrument makes a promise to A., is not liable on the contract, they place no difficulty in the way of showing that some other person, Y., is also liable. (*p*) Nor, again, where a contract is expressly made by word of mouth, *e. g.*, where X. in so many words promises A. to pay A., *e. g.*, for goods supplied to M., can there arise any difficulty, supposing the facts to be capable of proof, in fixing upon X. as at any rate one person to be sued for a breach of the contract.

Difficulty arises when the contract to be sued upon is not an "express contract," *i. e.*, an agreement expressed either in writing or distinctly by word of mouth, but a contract arising from the acts of the parties, *e. g.*, in the course of business between them.

The question to be considered in this case is, who was the person who allowed the plaintiff to give credit to him,

(*n*) See as to different kinds of considerations, Lampleigh v. Braithwait, 1 Smith, L. C., 6th ed., 142.

(*o*) Shadwell v. Shadwell, 8 C. B., N. S., 159; 30 L. J. 145, C. P.

(*p*) Thomson v. Davenport, 2 Smith, L. C., 6th ed., 349-361.

or placed himself in such a position as to entitle the plaintiff to give credit to him. X., for example, orders
[227] goods in company with Y., to be sent to Y., who receives and uses the goods. In settling which of the two A., the vendor, ought to sue for the price of the goods, the point to be determined is, whether credit was given to X. or to Y., or in other words, whether it was X. or Y. who held himself out to A. as the person to whom A. was to look for payment. The fact that the goods were supplied to and used by Y. is primâ facie evidence of their being supplied on his credit; but the question to be decided is not who used the goods, but who it was who undertook or promised by his acts to pay for them. (*q*) Thus, where a business has been carried on by an executor as trustee for the benefit of the children of the testator, the executor has been held personally liable for debts incurred in the business, because credit was given to him (*r*) and in various instances it has been held, that the person liable for the repairs of a ship, or for goods supplied to a ship, is not necessarily the owner; but is the person on whose credit the work was done, or the goods supplied; (*s*) since "it is perfectly settled now, that the liability to pay for supplies to a ship depends on the contract to pay for them, and not on the ownership of the ship." (*t*)

So, where X. and Co. were registered as proprietors of a newspaper under 6 & 7 Will. IV. c. 76, s. 6, the fact of their names appearing as proprietors was held not to make them liable in respect of a contract specifically entered into by M., the real proprietor of the newspaper after they had ceased to be interested in it. (*u*) For

(*q*) Most of the difficulties in choosing the right defendant in an action ex contractu arise from the existence, in one form or another, of the relation of principal and agent. See Chapter XII.

(*r*) Viner v. Cadell, 3 Esp. 88.

(*s*) Young v. Brander, 8 East, 10; Annett v. Carstairs, 3 Camp. 354; Mitcheson v. Oliver, 5 E. & B. 410; 25 L. J. 39, Q. B.

(*t*) Mitcheson v. Oliver, 5 E. & B. 443, per CURIAM. Compare Myers v. Willis, 17 C. B. 77; 25 L. J. 39, C. P.; Brodie v. Howard, 17 C. B. 109; 25 L. J. 57, C. P.

(*u*) Holcroft v. Hoggins, 2 C. B. 488; 15 L. J. 129, C. P.

"the question in this case" was, "whether the de- [228]
fendants were contractors, not whether they were interested as proprietors in the newspaper wherein the plaintiff's articles appeared." (*x*) "The jury found that the contract, in fact, was not made by the defendants, or by their authority. The circumstance of the defendants' names remaining as registered owners, [did] not make the contract theirs, if it was made by the plaintiff exclusively with another party." (*y*)

Exception 1.—Actions against a person appointed by statute to be sued on behalf of others. (*z*)

Exception 2.—Actions on some contracts implied by law or actions quasi ex contractu. (*a*)

As already pointed out, the law often allows one person to sue another as if there were a contract between them, though in point of fact no contract exists. In other words, a person who has not made a promise is, under certain circumstances, liable to be sued as if he had made a promise. A promise on his part is, to use the technical expression, implied by law. The numerous cases in which a person is liable to an action for money had and received, though, in fact, he has entered into no contract with the plaintiff, have been already considered. (*b*)

The action, again, for money paid is in many cases an action quasi ex contractu, in which the defendant is liable, not because he has made any promise, but because the law treats him as if he had made a promise. Thus, as already pointed out, if A. renders a service to X., *e. g.*, pays X.'s debts without any express or tacit promise on X.'s part to remunerate him, X. is not liable to be sued by A.

(*x*) Holcroft v. Hoggins, 2 C. B. 492, judgment of TINDAL, C. J.
(*y*) Ibid., 494, per CRESWELL, J.
(*z*) See Rule 11, Exception 1, Rule 20, Exception 1, and Chapter XIII.
(*a*) See *ante*.
(*b*) See *ante*. See also Russell v. Bell, 10 M. & W. 340, 352; Hill v. Perrott, 3 Taunt. 274; Rumsey v. North-East Rail. Co., 32 L. J. 244, C. P.; 12 C. B., N. S., 641.

for payment. But if A. is compelled to make a
[229] payment which X. is legally compellable to make,
or to do anything which X. is legally compellable to do, (*c*) X. is liable to an action on contract at the suit of A.; that is, X., who has made no promise to pay A., is, under the circumstances of the case, liable to be sued as if he had made a promise or contracted to pay A.

RULE 48.—The person to be sued for the breach of a contract by deed is the person by whom the contract is expressed by the deed to be made, *i. e.*, the covenantor. (*d*)

The covenantor is the person who must be sued for a breach of covenant. Where, therefore, X. covenanted with A. for himself and his heirs under his own hand and seal for the act of Y., he was held personally bound by his covenant, though he described himself in the deed as covenanting for and on the part and behalf of Y. "The court said that it was impossible to contend that where one covenants for another he is not to be bound by it; the covenant being in his own name 'for himself, his heirs, &c.' There is nothing unusual or inconsistent in the nature of the thing, that one should covenant to another that a third person should do a certain thing, as that he should go to Rome. The party to whom the covenant is made may prefer the security of the covenantor to that of his principal. Here the defendant covenants for himself, not in the name of his principal, and puts his own
seal to it. There is nothing against law in it if he
[230] will bind himself for his principal." (*e*) The cov
enantor is, moreover, the only person who can be sued for the breach of a covenant. (*f*)

(*c*) Lampleigh v. Braithwait, 1 Smith, L. C., 6th ed., 137, 144.

(*d*) Or the representatives of such person. Compare further Rule 12.

(*e*) Appleton v. Binks, 5 East, 147, 148, per CURIAM. Compare Priestley v. Fernie, 3 H. & C. 986; 34 L. J. 175, Ex., judgment of BRAMWELL, B.

(*f*) See *ante*.

A covenantor, again, may, it seems, be sued on a covenant by him contained in a deed, inter partes, though himself not a party to the deed; (*g*) but no one can be sued on a covenant who has not executed a deed, for "it is a technical rule that a contract under seal can not bind a person not executing." (*h*) The rule as to a covenantee and a covenantor may be thus summed up. A covenantee can not sue on a covenant in an indenture if he is not a party to the deed, but he can sue on a deed which he has not executed. A covenantor can be sued on a covenant in an indenture even though he is not a party to the deed; but he can not be sued on a covenant in a deed which he has not executed.

RULE 49.—Where several persons are jointly liable on a contract, they must all be sued in an action for the breach thereof, *i. e.*, joint contractors must be sued jointly. (*i*) [1]

(*g*) Salter v. Kidgley, Carth. 76; Coke, Litt., 230 b. Some doubt as to this is expressed by PARKE, B.; Beckham v. Drake, 9 M. & W. 95; Lush, Practice, 3rd ed., 16, note 2; Davidson, Precedents, 3rd ed., 36. Contrast this with the rule as to covenantees, *ante*.

(*h*) Priestley v. Fernie, 3 H. & C. 986, per BRAMWELL, B.

(*i*) See *ante*.

[1] One indorser of a promissory note, against whom a bill in equity is brought, has a right to insist that the other indorsers be made parties. Riddle v. Mandeville, 5 Cranch, 322. On a bill to establish the defense of usury to a suit against the makers of a joint and several promissory note, all the makers of the note must be made parties. Beggs v. Butler, 9 Paige (N. Y.) 226. All the obligors of a bond should be made parties to a bill brought to obtain relief against it, unless in a special case of collusion. Pollard v. Collier, 8 Ohio, 43; Commissioners v. Rose, 1 Dersaus, 461. Where A. agreed to transfer stock to B. if C.'s note were not paid at maturity, and B. brought a suit to compel the transfer, C. was held to be a proper party. Smedberg v. Whittlesey, 3 Sandf. (N. Y.) Ch. 320. The assignor of a note is a necessary party to a cross-bill by the assignee of the note, whose judgment is enjoined.

If X., Y., and Z. are joint contractors, they should all be made defendants in an action for breach of the contract, and if X. alone is sued, he may by proper

Curd v. Lewis, 1 Dana (Ky.) 351. Every party interested in land belonging to co-tenants is a necessary party to a bill for partition. Borah v. Archers, 7 Dana (Ky.) 176. The fact that a party is interested in the decree is a sufficient reason why he should be made a co-defendant to the bill, and he may be brought out of his county for that purpose. Jackson v. Waters, 10 Ga. 546. Where parties liable to a demand are very numerous, a complainant may proceed against a part of them for their aliquot shares. Thornton v. Hightower, 17 Ga. 1. On a bill to obtain restitution of payment made under an erroneous decree, which has been reversed, all the parties jointly liable to the decree should unite, and all the heirs and devisees of the deceased party who recover the erroneous decree should be made defendants. Madison v. Wallace, 2 Dana (Ky.) 61. In a bill in equity to establish the title to certain premises, any persons claiming any right or interest in said premises may be made defendants, no matter how baseless their claims may be. Finch v. Martin, 19 Ill. 105. A bill may be sustained against different persons, relative to matters of the same nature, in which all of the defendants were more or less concerned, though not jointly in each act. Wheeler v. Clinton County Bank, Harr. (Mich.) 449. But a party can not be joined as a co-defendant in equity against whom a decree can not be had, his liability, if any, being such as should be enforced in a court of law. Peay v. Wright, 22 Ark. 198. Todd v. Sterrett, 6 J. J. Marsh (Ky.) 425. Persons can not be made parties defendants, in a suit in chancery, on the ground of their being the agents of a party interested, where no specific relief is asked against them; and where the bill contains no allegation that they acted as such agents in relation to the transaction in question, or that they had any interest in or connection with the subject-matter of the litigation. Garr v. Bright, 1 Barb. (N. Y.) Ch. 157. Voluntary or execution purchasers, pending a suit, can not be made parties without the complainant's consent; their remedy is by an original, in the nature of a supplemental or cross-bill. Steele v. Taylor, 1 Minn. 274. Chancery will not admit a stranger, on his own motion, to be admitted as a defendant. Smith v. Evans, 3 A. K. Marsh (Ky.) 217; Davis v. Harrison, 2 J. J. Marsh (Ky.) 189; Buford v. Rucker, 4 Id. 551; Westfall v. Scott, 20

pleading, that is, by a plea in abatement, compel the plaintiff to add Y. and Z. as co-defendants. But if the objection that a contractor is omitted who is jointly liable with the defendant, is not taken by a plea in abatement, proof at the trial of a joint contract sustains the allegation that the defendant contracted. (*j*) A contrac- [251] tor, that is to say, may, by proper pleading, cause the persons liable together with him, to be made co-defendants in an action for the breach of their joint contract; but he can not get rid of his liability simply by proving that other persons are also liable. (*k*)

A. sued X., the commandant of a volunteer corps, and a member of the committee, for the price of uniforms supplied to members of the corps. No plea in abatement was pleaded, and it was held that if the contract on which the action was brought was made by X. jointly with the committee, or jointly with the whole corps, he was liable even though sued alone. (*l*)

A defendant sometimes can not plead the non-joinder of his co-defendants, even in abatement. The cases where such a plea can not be pleaded form the exceptions to the general rule.

Exception 1.—Where a co-contractor has become bankrupt.

Where a joint contractor has become bankrupt, an action may be brought on the contract against his co-contractors alone. (*m*)

Exception 2.—Where a claim is barred against one or more joint debtors, and not against others.

(*j*) 1 Wms. Saund. 291, 291 *b*; Whelpdale's Case, 5 Coke, Rep. 119 *a*; Richards v. Heather, 1 B. & Ald. 35; Cross v. Williams, 7 H. & N. 675; 31 L. J. 145, Ex.

(*k*) Contrast this with the rule as to co-plaintiffs, Rule 13; and see Chapter XXXIV.

(*l*) Cross v. Williams, 7 H. & N. 675; 31 L. J. 145, Ex.; Rice v. Shute, 1 Smith, L. C., 6th ed., 511.

(*m*) 3 & 4 Will. IV. c. 42, s. 1.

Ga. 233. Persons incidentally interested in the estate, but not made parties, can not be made parties after the final decree, upon their own motion. Ward v. Clark, 6 Wis. 509.

Where several persons are joint debtors, it may happen that in consequence of an acknowledgment or part payment of the debt by one or more of them, the effect of the Statutes of Limitation is avoided as regards one or more of them, and not as regards others. (*n*) Those only [232] should be sued against whom the claim is not barred.

Exception 3.—Where a co-contractor is resident out of the jurisdiction.

If one of several co-contractors is resident out of the jurisdiction, all or any of them may be sued, and the person or persons sued can not object to the non-joinder of their co-contractors.

A defendant is "required in a plea in abatement to allege the non-joinder of all the co-contractors [not joined], and the plea [is] answered by showing the omission of one, it being the defendant's duty to give the plaintiff a better writ against all those who are jointly liable with him." (*o*) He is also bound (*p*) to allege that the person whose non-joinder is objected to is resident within the jurisdiction, and to state his place of residence. If, therefore, one of the persons whose non-joinder is objected to resides without the jurisdiction, the conditions on which a plea in abatement for non-joinder can be pleaded can not be fulfilled, and the same result follows from the fact of a defendant's not knowing the residence of any one of his co-contractors. A defendant, in short, can not object to the non-joinder of his co-contractors "unless all the co-contractors are within the jurisdiction, and their places of residence can be given." (*q*) Thus, X., Y., and Z. are co-contractors, and Z. resides beyond the jurisdiction. If an action be brought against X. and Y., they

(*n*) 9 Geo. IV., c. 14, s. 1; 19 & 20 Vict. c. 97, ss. 13, 14; Boydell v. Drummond, 2 Camp. 157; Darby & Bosanquet, Limitations, 44, 104; Bullen, Pleadings 3rd ed., 642–644.

(*o*) Joll v. Curzon, 4 C. B. 249, 254, judgment of WILDE, C. J.

(*p*) 3 & 4 Will. IV., c. 42, s. 8. Bullen, Pleadings, 3rd ed., 471.

(*q*) Joll v. Curzon, 4 C. B. 255, per WILLIAMS, J.

can not object to the non-joinder of Z., and if an action be brought against X. alone, or Y. alone, the defendant can not take any objection to the non-joinder of the other co-contractors.

Exception 4.—Where an action is brought against common carriers.

In an action against common carriers either all may be joined as defendants or one or more may [233] be sued without joining the others. (*r*)

Exception 5.—Where an action is brought against a firm, some of the members of which are nominal or dormant partners.

Where an action is brought against the members of a firm, merely nominal or dormant partners may be joined or not as defendants at the plaintiff's choice. It is, however, best to join them. (*s*)

Exception 6.—Where a co-contractor is an infant or a married woman.

Where an infant or married woman contracts together with other contractors, the latter alone must be sued. The infant or the married woman must be considered as not having contracted, and the joinder of either of them will be, unless amended, a fatal error. (*t*)

(*r*) "Any one or more of [several] mail contractors, stage-coach proprietors, or common carriers shall be liable to be sued by his, her, or their name or names only; and . . . no action or suit commenced to recover damages for loss or injury to any parcel, package, or person shall abate for want of joining any co-proprietor or co-partner, in such mail, stage-coach, or other public conveyance by land for hire." 11 Geo. IV.; 1 Will. IV., c. 68, s. 5.

(*s*) Chapter XIII.

(*t*) These exceptions differ in character. In the first five cases the plaintiff may join the persons whom he is not compelled to join as defendants, and the only harm he can suffer is, that in some of these cases, *e. g.*, where the defendant joined is bankrupt, or is protected by the Statutes of Limitation, he will fail in his action as against such defendant. In the sixth case the plaintiff must not join the person, *sc.*, the infant, or married woman, whom he can not be compelled to join as a defendant; for the joinder of such infant, or married

RULE 50.—Covenantors and other contractors may be at once jointly and severally liable upon the same covenant or contract, in which case they may be sued either jointly or separately. (*u*)

[234]. Covenantors and other contractors may, by the same covenant or contract, bind themselves at once jointly and severally, that is, they may make themselves liable to be sued at the option of the plaintiff, either jointly or severally. X., Y., and Z., for example, bind themselves by a joint and several bond or promissory note. The plaintiff may sue either X., Y., and Z. jointly, or X. separately, Y. separately, &c. (*x*) On one joint and several covenant or contract it may be right to sue all the covenantors, &c., jointly, *e. g.*, X., Y., and Z., or to sue each of them, *e. g.*, X., or Y., or Z. separately. But it is not right to sue more than one without suing all. (*y*)

RULE 51.—The liability to an action on contract can not be transferred or assigned.

A person bound to perform a contract can not, either before or after a breach of it, assign to another his liability to be sued by the person with whom the contract is made. (*a*) Thus, an agreement between retiring partners

woman, will, if properly pleaded, make the action fail not only against such person, but also as against all the defendants. Boyle v Webster, 17 Q. B. 950; 21 L. J. 202, Q. B. See further as to the effect of non-joinder and mis-joinder, Chapter XXXIV.

(*u*) Contrast Rule 14.

(*x*) Recovery against X., it must be remembered, is a bar to an action against Y., &c., and vice versa.

(*y*) Though this holds good with regard to what is, in law, one joint and several covenant, it does not always apply to what, in popular language, would be called one covenant. Suppose X., Y., and Z. covenant jointly and severally, and also each two of them covenant, *e. g.*, X. and Y., Z. and Y., &c. In such a case X. and Y. can be sued without joining Z. They are sued not on the joint and several covenant of X., Y., and Z., but upon an independent covenant by X. and Y.

(*a*) Rule 9.

and the remaining members of the firm, that the latter shall be liable for all the debts of the firm, though it may be binding between the parties to the agreement, does not relieve the retiring partners from liability to the creditors of the firm. (*b*)

Exception 1.—Where there is a change of credit by an [235] agreement between all the parties.

The liability for a debt, though not assignable by the act of the debtor alone, may be transferred by a binding agreement between all the parties, to the effect that the original debtor shall be discharged, and a new debtor accepted in his place. Thus X. is indebted to M., and M. to A. By agreement of all the parties, the debt of X to M. is discharged, and X. is accepted by A. as debtor in M.'s place. (*c*) Such a transfer of liability frequently occurs upon a change in a firm (*d*) of partners, when the debts of the old firm may be, by agreement of all the three parties (the creditor, the new firm, and the old firm), transferred to the new firm, so as to render the new firm liable to the creditor in substitution of the old firm, and to discharge the latter; and this agreement may be either express or arise from the acts of the parties. (*e*) The same thing takes place when, by agreement between all the parties, liability is transferred from the original contractors to one only of their number. (*f*) It might be thought that in this case there was no consideration (*g*) for the agreement, since the person to whom the liability is transferred is already jointly liable to the creditor. But this is not so, since it is demonstrable that the sole

(*b*) Chapter XIII.

(*c*) Tatlock v. Harris, 3 T. R. 174, 180; Cuxon v. Chadley, 3 B. & C. 591. Compare, as to assignment of right of action by agreement between the parties, *ante*; Wilson v. Coupland, 5 B. & Ald. 228.

(*d*) For the nature of a firm, see *ante*.

(*e*) Hart v. Alexander, 2 M. & W. 484; Rolfe v. Flower, L. R. 1, P. C. 27.

(*f*) Lyth v. Ault, 7 Exch. 669.

(*g*) See *ante*.

security of X. may be a better thing than the joint security of X. and Y. (*h*)

[236] An assignment of this kind can take place only by agreement among all the parties, (*i*) and apparently only in the case of debtors.

This exception is rather apparent than real. A new contract is in reality formed, part of the consideration for which is the release of the original debtor from liability under the original contract. It is, therefore, essential to such a transference of such a liability that the original debtor should be released.

Exception 2.—Where there are covenants between lessor and lessee which run with the land.

Where such covenants are made by a lessor, the liability on them passes to the assignee of the reversion. Where such covenants are made by a lessee, the liability on them passes to the assignee of the term. (*k*) Both lessor and lessee are liable for breaches of covenant committed before assignment.

Lessor.—On assignment of the reversion by the lessor, he ceases to be liable on covenants which run with the land. (*l*)

Lessee.—The original lessee is not freed from his personal liability on covenants in the lease, but may be sued notwithstanding that he has assigned the demised premises, and upon his death his liability upon his express

(*h*) Lyth v. Ault, 7 Ex. 672, judgment of POLLOCK, C. B.; Ibid. 674, judgment of ALDERSON, B.

The main reason why the sole security of X. may be a better thing than the joint security of X. and Y. is, that when X. is solely liable, his liability passes on his death to his representatives, and is enforceable against them at law; whilst, if X. is jointly liable with Y., X's liability at law does not pass on his death to his representatives, but survives against Y. only.

(*i*) Hodgson v. Anderson, 2 B. & C. 842, 855.

(*k*) See *ante*.

(*l*) "When the lessor grants his reversion, the privity of estate is thereby transferred to the grantee, and the privity of contract in respect of such covenants as run with the land is also transferred by force of the statute (32 Hen. VIII., c. 24);" Smith, Landlord and Tenant, 293, note 19. Conf. Bullen, Pleadings, 3rd ed., 638; Bickford v. Parson, 5 C. B. 920.

covenants devolves upon his executor. (*m*) In other words, the lessee continues liable to the lessor on express covenants in the lease, even though they are covenants which run with the land. Thus, if a lessee assign over his term, and the lessor accept the assignee as his tenant, the lessee is liable to an action by the lessor, [237] on an express covenant to pay the rent. (*n*) The lessee is not, however, liable after an assignment of his term to an assignee of the reversion, *i. e.*, if A. is the lessor and X. the lessee, and A. assign his reversion to B., and X. assign his term to Y., X. is under no liability to B., for X.'s liability to B. arises only from privity of estate, and is put an end to by assignment, if the assignee is accepted by the reversioner as tenant. (*o*)

On the assignment of the reversion, the lessee ceases to be liable to the lessor on covenants which run with the land, and will therefore pass to the assignee of the reversion. (*p*)

Assignee.—The assignee of the lessee is responsible only as long as he holds the estate in the land. If he re-assigns, he gets rid of liability in respect of future breaches of covenant, though he remains liable for breaches already committed by him. (*q*) He is not liable for breaches committed before assignment to him. (*r*)

RULE 52.—The liability to an action on a contract made by several persons jointly, passes at the

(*m*) Leake, Contracts, 629; Thursby v. Plant, 1 Wms. Saund., 240 *a*; Auriol v. Mills, 4 T. R. 94, 98.

(*n*) Bullen, Pleadings, 3rd ed., 637. "When the lessee assigns his estate, the privity of estate is transferred to the assignee, the lessee still remaining liable upon his privity of contract." Smith, Landlord and Tenant, 293, note 19.

(*o*) Wadham v. Marlow, 8 East, 314, n.; 1 Wms. Saund. 240, 241 *c*; 2 Ibid. 202, n. 5; Leake, Contracts, 629.

(*p*) Green v. James, 6 M. & W. 656; 1 Smith, L. C., 6th ed., 61.

(*q*) Harley v. King, 2 C. M. & R. 18; Taylor v Shum, 1 B. & P. 21; Spencer's Case, 1 S. L. C., 6th ed., 45, 60.

(*r*) Coward v. Gregory L. R. 2, C. P. 153; 36 L. J. 1, C. P.

death of each to the survivors, and on the death of the last to his representatives. (*s*) [1]

A joint contract is made by X., Y., and Z. The liability to be sued upon the contract passes, on the
[238] death of Z., to X. and Y.; on the subsequent death of Y., to X.; and on the death of X. (provided the liability to be sued survives), (*t*) to X.'s executor or administrator. The representatives, *e. g.*, of Z. can neither be sued upon the contract themselves nor be sued jointly with X. and Y.

A person's separate liability on any contract passes, of course, to his representatives. If, therefore, X., Y., and Z. enter into a joint and several contract, and Z. die, X. and Y. may be sued on their joint contract, and Z.'s executor may be sued on Z.'s separate contract. In other words, a joint and several contract by X. and Y. is, in effect, three contracts, a joint contract by X. and Y., a separate contract by X., and a separate contract by Y.

(*s*) Compare Rule 16.
(*t*) Chapter XVIII.

[1] See Lansdall v. Cox, 7 J. J. Marsh. 391.

CHAPTER XII.

PRINCIPAL AND AGENT.

RULE 53.—A contract entered into by a principal, (*a*) through an agent, is in law made by the principal, and the principal, not the agent, is the person to be sued for the breach of it.

A principal is bound by the acts of an agent which he authorizes before, or ratifies (*b*) after, they are done.

The main difficulty in fixing one person with responsibility for a contract made by another person on his behalf, lies in establishing that such other person has authority to contract, *i. e.*, that he is in law the agent of the alleged principal.

The principle which pervades all cases of agency is, that the principal is bound by all acts of his agent within the scope of the authority which he gives him, (*c*) or appears to the world to give him.

(*a*) Rule 17. See n. (*c*) *ante*, as to the use of the letters P. A. and T. throughout this chapter.

(*b*) For ratification, see *ante*.

(*c*) The term authority includes implied as well as express authority. Many difficulties in the law of agency arise from the ambiguous use of this word. Authority is sometimes used for that authority only which a principal intends to give his agent, and sometimes also for the authority which a principal, though he may not intend to do so, does, as a matter of fact, give his agent from the position in which he places him. An agent may bind his principal beyond the authority which the principal intends to give him, and thus may, as between his principal and himself, act in excess of his authority. But an agent can not bind his principal, as regards third persons, beyond the authority which he derives, either directly from the principal, or indirectly, as a consequence of the position in which he is placed, or suffered to stand, by his principal. The important point to remember is that as regards third persons the only question is, what authority has P. apparently given A.? What has he suffered third parties to believe respecting A.'s position and powers? Story, Agency, s. 127, n. (1); Byles on Bills, 8th ed., 29.

[240] In other words, the principal is always bound by the acts of his agent, up to the extent of the agent's authority, and is never bound beyond the extent of that authority. (*d*) For in so far as the principal empowers the agent to represent him, and in so far only, the agent is (for legal purposes) the principal, and binds the principal by his acts. The difficulties which arise are mainly due to confusion between the extent to which the principal has actually empowered the agent to represent him, and the extent to which he has intended to empower him.

The authority of an agent is either express or implied.

It is termed express or actual authority when the agent derives authority expressly, *i. e.*, by writing or word of mouth, from the principal.

When a plaintiff relies solely upon the express authority of an agent in order to fix a principal with responsibility, the main question to be determined must be, what was the actual authority given? This inquiry must itself be either a question of fact for the jury, to be determined by evidence, if the authority was given by word of mouth, or a question for the court as to the meaning or construction of a written document, if the authority was given in writing.

The authority is termed implied or presumptive authority when the agent derives authority from the principal impliedly (or tacitly), *i. e.*, from the acts or conduct of the principal; or in other words, from being placed

[241] "in a situation in which, according to ordinary rules of law, or, perhaps, it would be more correct to say, according to the ordinary usages of mankind, [the agent] is understood to represent and act for the person who has so placed him." (*f*)

(*d*) It follows that the authority conferred on an agent for any purpose must always be held to include, unless there is something specially to negative the inference, all the necessary and usual means of executing it with effect (Withington v. Herring, 5 Bing. 442; Howard v. Bailey, 2 H. Bl. 618; Fenn v. Harrison, 3 T. R. 757; Tobin v. Crawford, 9 M. & W. 716; Story, Agency, ss. 58–65.

(*f*) Pole v. Leask, 33 L. R. 162, Ch. (H. L.), per Lord CRANWORTH.

The ground on which a principal is bound by the apparent authority of his agent has been thus laid down with reference to a particular case:—

"Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I can not subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal sends his commodity to a place where it is the ordinary business of the person to whom it is confided, to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse sent it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe." (*g*)

Most cases of agency depend on the existence of implied authority. The authority, for instance, of a servant to bind his master within the scope of his [242] usual employment, (*h*) of a partner to bind his co-partners (*i*) in their business transactions, of auctioneers, brokers, factors, cashiers in banks, masters of ships, shop-

(*g*) Pickering v. Busk, 15 East, 43, per CURIAM.

(*h*) See Smith, Master and Servant, 2nd ed., 166; Nickson v. Brohan, 10 Mod. 109, 110.

(*i*) Hawken v. Bourne, 8 M. & W. 703.

men, &c., and of numerous other agents, arises in each case from the fact that the person exercising the authority has been placed, or rather has been allowed to stand, in a position in which, according to the ordinary usages of mankind, he is understood and reasonably believed by third parties to have a right to bind his principal. (*k*)

From the nature of implied or apparent authority flow the following results:—

First. A principal may be bound by the act of his agent after the authority to act for him has been, as between him and the agent, revoked; for to persons who do not know of the revocation, the agent may appear to have authority, and therefore really have authority, as regards such persons, to bind the principal. (*l*)

Secondly. An agent's apparent authority can not be limited by the private orders of his principal, which are unknown to the third parties dealing with the agent. (*m*)

(*k*) What is the extent of an agent's implied authority, is a question sometimes of law, at other times of fact.

The powers of some kinds of agents, *e. g.*, partners, factors, brokers, &c., are so well known that they are assumed, as a matter of law, to be, in the absence of proof to the contrary, of a certain description.

On the other hand, the powers of the greater number of agents are not settled as a matter of law. The authority, for instance, of a servant to pledge his master's credit, of the manager of a bank to endorse bills on his employer's behalf, &c., arises—if it exists at all—solely from the principal, in either case, having held out the agent as having authority to pledge his credit or sign bills.

(*l*) ——— v. Harrison, 12 Mod. 346.

(*m*) See Story, Agency, s. 127, n. 1; Byles on Bills, 29.

A distinction is often drawn as to the effect of private orders between the position of a general and a particular agent: a general agent being one who is employed to perform all things usual in a particular course of business or employment, *e. g.*, a factor, broker, &c.; a particular agent is one who is employed in a single instance (Whitehead v. Tuckett, 15 East, 400; Story, Agency, 127, n. 1), *e. g.*, a servant sent for the first time by his master to borrow money of a friend. "The authority," it has been said, "of a general agent to perform all things usual in the line of business in which he is employed, can not be limited by any private order, nor known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, *i. e.*, an agent employed specially in a single transaction; for it is the duty of a party dealing with such a one, to ascertain the extent of his authority, and if he do not he must abide the consequences" (Smith, Mercantile Law, 7th ed., 128, 129). But the distinction thus laid down is not, it is submitted, maintainable, since, if even a particular agent (though the term itself is not a very happy one, Byles on Bills, 8th ed., 29) is held out to other persons as having an authority beyond that

Thirdly. Where a person knows, or ought to [243] know, that an agent's authority is limited by private instructions, he is bound by the limit actually imposed by the principal. (*n*)

The following cases illustrate the positions laid down as to an agent's power to bind his principal within the extent of his authority.

P. expressly authorizes A. to buy goods for him from T. P. is of course liable to be sued by T. for the price of the goods thus bought. If P. gives A. a greater actual and express authority than A. appears to possess, *i. e.*, than T. is justified at the time of contracting with P., through A., in believing A. to have, P. is, it would seem, nevertheless bound. T. acted at his risk, but since P. gave A. actual authority, *e. g.*, to borrow money for him, T. may apparently take advantage of such authority.

P. habitually employs his servant, A., to buy [244] goods on P.'s credit. A. buys goods on P.'s credit, which P. has not authorized him to buy. P. is nevertheless bound to pay for the goods, since A. has, in the eyes of third persons, an implied or apparent authority to pledge the credit of P. (*o*) And it appears possible that an implied authority to order goods may arise from recognition of the authority of the agent in a single instance. (*p*) Whether it arises or not will usually be purely a question for the jury.

Where P. used to give his servant, A., money every Saturday to defray the charges of the foregoing week,

which his principal intends him to possess, the principal will be bound up to the extent of the agent's apparent authority (Story, Agency, s. 127). The true rule seems to be, that an apparent authority can never be restrained by private orders from the principal which are unknown to the third party; but that a particular agent, as being employed in one instance only, can rarely have any apparent authority whatever, and third persons therefore must, as a general rule, trust to his real or actual authority. Compare Alexander v. Gibson, 2 Camp. 555; Brady v. Todd, 30 L. J. 223, C. P.; 9 C. B., N. S., 592; Howard v. Sheward, L. R. 2, C. P. 148; 36 L. J. 42, C. P.; Ward v. Evans, 2 Ld. Raym. 928.

(*n*) Baines v. Ewing, L. R. 1, Ex. 320; 35 L. J. 194, Ex.; Smith, Master & Servant, 2nd ed., 168.

(*o*) Nickson v. Brohan, 10 Mod. 109; Wailand's Case, 3 Salk. 234.

(*p*) Hazard v. Treadwell, 1 Str. 506.

though the servant kept the money, the master was held chargeable, "for the master at his peril ought to take care what servant he employs, and it is more reasonable that he should suffer for the cheats of his servant than strangers or tradesmen." (*q*)

P., a jeweler, kept a shop in the country, living himself in London. The country shop was managed by a shopman, A., from whom T. had been in the habit of receiving orders in P.'s name, for goods, which were sent to the country shop, and afterwards paid for by P. A. went to London, and ordered jewelry there of T. in P.'s name, which he then carried away with him, and absconded with. T., it was held, could sue P. for the price of the goods obtained by A. (*r*)

"The question in this case [and the same remark applies to other cases of a similar kind] was not what was the exact relation between the defendant and A., but whether the defendant had so conducted himself and held the other out as to lead the plaintiff reasonably to suppose that A. was the defendant's general agent for the purpose of ordering goods." (*s*)

[245] P., who was not a horse-dealer, sent A., his servant, with a horse to Tattersall's for sale, with instructions to warrant him sound, and he warranted him free from vice. P. was held liable upon the warranty, although it was contended on his behalf that the servant was but a special agent, and, having exceeded his authority, the master ought not to be bound. (*t*) Where, again, P. entrusted A., his servant, to sell his horse at a fair, and to receive the price, and A. warranted him sound, the defendant was bound by the warranty. (*u*) But though the servant of a horse-dealer has authority to warrant, and this, even though, unknown to the buyer, he has ex-

(*q*) Wailand's Case, 3 Salk. 234, per HOLT, C. J.

(*r*) Summers v. Solomon, 26 L. J. 301, Q. B.; 7 E. & B. 879. BRAMWELL, B., does not assent to the law of this case. 3 H. & N. 794.

(*s*) Summers v. Solomon, 26 L. J. 302, Q. B., judgment of COLERIDGE, C. J.

(*t*) Helyear v. Hawke, 5 Esp. 72.

(*u*) Alexander v. Gibson, 2 Camp. 555.

press orders not to warrant, (*y*) and though, apparently, the servant of a private person who is sent to a fair or mart to sell a horse may have authority to warrant, on the ground that the person entrusted with the sale of a horse in a fair or public mart appears to be the owner, and to have all the powers of an owner in respect of the sale, yet the servant of a private owner has not, as a general rule, authority to warrant. Thus T. applied to P., who was not a dealer in horses, to sell him a horse. P. sent his farm-bailiff, A., with the horse to T., and authorized him to sell it for thirty guineas. A. warranted the horse, but it was held that P. was not bound by this warranty. (*z*)

These cases exactly illustrate the principle on which a person who employs an agent to act for him is bound as regards third persons by the authority which the agent appears to have, though as between the employer and the agent the authority may be restricted considerably within its apparent extent. The servant of a horse-dealer can bind his master by a warranty even if ordered not to give it, since he appears, from the usual course of dealing at a horse-dealer's, to have such authority ; and the same principle applies to the servant of a private person [246] if sent to sell a horse at a public mart. On the other hand, such a servant, if not sent to a fair or mart, and if he has not habitually acted for his master, has no authority except that which is actually given him, and as he has no apparent authority, a third person dealing with him must trust entirely to his actual authority ; and what the case of Brady v. Todd established is that "in the case of a single transaction of sale by the servant of a private individual" there is no implied authority to warrant, "because, in such a case, the buyer has no right to presume any authority in the servant beyond that which is apparent on the particular occasion." (*a*)

(*y*) Howard v. Sheward, L. R. 2, C. P. 148 ; 36 L. J. 42, C. P.

(*z*) Brady v. Todd, 30 L. J. 223, C. P. ; 9 C. B., N. S., 592.

(*a*) Howard v. Sheward, L. R. 2, C. P. 151, judgment of WILLES, J. Compare Fenn v. Harrison, 3 T. R. 759, 760.

A., the servant of P., had authority to draw bills of exchange in P.'s name, and afterwards was turned out of P.'s service. In this case it was said by HOLT, C. J., "if he draw a bill in so little a time after, that the world can not take notice of his being out of service; or, if he were a long time out of his master's service, but that kept so secret that the world can not take notice of it, the bill, in these cases, shall bind the master." (*b*)

P. sent his servant, A., to T. to receive £60. A. received, not £60, but a goldsmith's note. It was held that P. was not bound by A.'s act in receiving the note instead of the money; (*c*) for this being a single transaction, A. had no authority beyond that actually given him by his master, and persons dealing with A. were bound to ascertain what that authority really was.

But if T. deals with A., the servant of P., and knows of the private agreement or instructions given by P. to A., he can not charge P. upon any contract contrary to that agreement. (*d*)

[247] A., the manager of a banking company, had authority to draw, indorse, and accept bills on account and for the benefit of the company. He indorsed a bill for the accommodation of one T., "per proc." of the company. It was held, that the company were not bound by such indorsement; (*e*) for that where the acceptance or indorsement of a bill of exchange is expressed to be "per proc.," this is a notice to the indorsee that the party so accepting or indorsing professes to act under an authority from some principal, and imposes upon the indorsee the duty of ascertaining that the party so accepting or indorsing is acting within the terms of such authority.

Ratification.—The rules as to ratification which govern

(*b*) ——— v. Harrison, 12 Mod. 346, per HOLT, C. J.

(*c*) Ward v. Evans, 2 Ld. Raym. 928.

(*d*) Howard v. Braithwaite, 1 Ves. & B. 209; Smith, Master and Servant, 2nd ed., 168; Baines v. Ewing, L. R. 1, Ex. 323, judgment of BRAMWELL, B.

(*e*) Alexander v. Mackenzie, 6 C. B. 766. It is, however, often a difficult matter to decide to what extent a third party is bound to push his inquiries in order to ascertain that a person or agent is acting within his authority (Smith v. McGuire, 27 L. J. 467, 469, Ex.; judgment of POLLOCK, C. B.).

a principal's right to sue on a contract apply mutatis mutandis to his liability to be sued. (*f*)

Authority of some kind necessary.—A person is often fixed with liability for a contract, the making of which he has not in the ordinary sense of the word authorized, since his liability may arise from the fact that he has placed some person in a position in which such person appears to have authority, or in other words, really has implied authority, to contract for him. But no one can ever be made liable as principal for a contract made on his behalf by an agent, who has not given such agent authority, either express or implied, by his spoken or written words, or by his acts, to contract for him. For "no one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case it is only by the will [248] of the employer that an agency can be created.

"This proposition, however, is not at variance with the doctrine, that where one has so acted, as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed.

"Another proposition to be kept constantly in view is, that the burden of proof is on the person dealing with any one as an agent through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it." (*g*)

Hence, where a master has not, either expressly or by

(*f*) See *ante*.

(*g*) Pole v. Leask, 33 L. J. 161, 162, Ch., judgment of Lord CRANWORTH.

implication, authorized his servant to pledge his credit, his servant can not, by doing so, render him liable to pay for goods so obtained. So where P.'s servant, A., injured his master's carriage by careless driving, and without any orders from P., left it with T., a coach maker, to be repaired, it was held that T. had no claim against P. for the sum due for repairs. (*h*)

Nor, again, can a person be made liable simply because a third party chooses to look upon or treat him as principal in a transaction which he did not authorize. Thus in a case where the defendant was sued by the executor of a public-house keeper, for the price of meat and drink supplied to voters during an election, it was laid down that "the plaintiff must prove an express contract, or a contract implied between the defendant and his testatrix, to pay for the meat and drink supplied by her to the voters. The burden of proof is on the plaintiff. The first question will be, whether any contract at all was entered into with plaintiff's testatrix. If she supplied the [249] meat and drink to the voters on a mere speculation that the candidate, or some one interested in the election, would, as a matter of honor, pay for them, no contract was thereby created with any one." (*i*)

Actions against clubs.—The liability of members of ordinary clubs, of provisional committees, of volunteer corps, and of other voluntary associations which are not partnerships, (*k*) on contracts entered into on behalf of the club or association, is not a question of law but of fact; (*l*) and when an action is brought against a defendant on a contract, made, *e. g.*, with the steward of a club, "the plaintiff must prove that the defendant, either himself or by his agent, has entered into that contract. That should always be borne in mind in cases of this class, for on most questions of this kind the real ground

(*h*) Hiscox v. Greenwood, 4 Esp. 164.

(*i*) Thomas v. Edwards, 2 M. & W. 216, 217, judgment of PARKE, B.

(*k*) Compare Chapter XIII.

(*l*) Compare Flemyng v. Hector, 2 M. & W. 179, judgment of ABINGER, C. B., with Bright v. Hutton, 3 H. L. C. 341.

of liability is apt to be lost sight of. As the defendant did not enter into the contract personally, it is quite clear that the plaintiff can not recover against the defendant unless he shows that the person making the contract was the agent of the defendant, and by him authorized to enter into the contract on his behalf, and the question is . . . whether there [is] . . . evidence . . . that the person who actually ordered [the] goods was the authorized agent of the defendant in making the contract; and that really is the question in all cases of this kind—in all cases of principal and agent, master and servant, wherever the contract is not made personally by the defendant." (*m*)

In the case of an ordinary subscription club the mere fact of a person's being a member does not give the committee of the club power to pledge his personal credit, and he can not, therefore, merely on the ground of his membership, be sued for the price of goods supplied to the steward according to the order of [250] the committee. (*n*) It seems also settled that the individual members of the committee of a club are not, merely as such, liable for the price of goods ordered by a member of the committee, and supplied by a tradesman upon credit for the purposes of the club. It must be shown in order to fix any individual member of the committee with responsibility, that the contract was made with his concurrence, or perhaps that the members of the committee are authorized to pledge one another's credit. (*o*) Hence, where two members of a club committee were sued for the price of goods supplied to the club on the order of another member of the committee, they were held not liable.

"I think," said ALDERSON, B., "that as the members of a club generally are to be considered as not having authorized anybody to deal with them upon credit, so here

(*m*) Flemyng v. Hector, 2 M. & W. 183, judgment of PARKE, B.

(*n*) Flemyng v. Hector, 2 M. & W. 172. Compare Cockerell v. Aucompte, 26 L. J. 194, C. P.; 2 C. B., N. S., 440.

(*o*) Todd v. Emly, 7 M. & W. 405.

the committee were authorized only to deal as a body for ready money. But at the same time if any of the members of the committee choose to contract, not for ready money, those members of the committee who have so contracted are liable upon their own contract, and the members who have not concurred in it are not liable, unless that be the common purpose for which the committee was appointed." (*p*)

If there is a division of opinion in the committee, and the majority only give authority to the agent to contract, those only are, it seems, liable on the contract who voted for it. (*q*) As, however, the reason why individual members of a club are not liable for the price of goods supplied to the club is that the rules of subscription clubs ordinarily show that it is not the intention of the members that the dealing of the club should be on
[251] credit, or that the individual credit of the members should be pledged, (*r*) the liability of individuals, supposing they have done nothing to make themselves personally liable, depends ultimately upon the rules of the club. If they show that goods are intended to be procured upon the credit of the members, the members will be liable to pay for the goods so procured. (*s*) [1]

The members of a volunteer corps, (*t*) or of a provisional committee, may or may not, according to circumstances, be liable to persons who supply goods or render other services to the members of the corps or of the committee. In each case the question is one of fact,

(*p*) Ibid., 435, judgment of ALDERSON, B. Compare Ibid., 8 M. & W. 505.
(*q*) Ibid., 505.
(*r*) See Todd v. Emly, 7 M. & W. 432, judgment of ABINGER, C. B.
(*s*) Cockerell v. Aucompte, 26 L. J. 194, C. P.; 2 C. B., N. S., 440.
(*t*) Cross v. Williams, 7 H. & N. 675; 31 L. J. 145, Ex.

[1] See Wharton on Agency and Agents, § 461; Story on Agency, § 287. In Devoss v. Gray, 22 Ohio St. 159, it was held, that the deacons of an unincorporated religious society could not, though ex officio agents for the business affairs of the society, be held personally liable for a contract made by other independent agents of the society. Consult Tobey v Claflin, 3 Sumner, 379.

and not of law; and the matter to be decided is, whether the persons sued did or did not allow the goods, &c., for the price of which the action is brought, to be supplied on their credit. (*u*)

"In general, when a man is known to be acting and contracting merely as the agent of another, who is also known as the principal, his acts and contracts, if he possesses full authority for the purpose, will be deemed the acts and contracts of the principal only, and will involve no personal responsibility on the part of the agent, unless the other circumstances of the case lead to the conclusion that he has either expressly or impliedly incurred or intended to incur such personal responsibility." (*x*)[1]

The exceptions to the rule under consideration are of two kinds. They are either cases in which the agent must be sued and the principal can not be sued, or else, cases in which either the principal or the agent may be sued.

Of the eight following exceptions the four first, and probably the eighth, are cases in which the agent must be sued, and the principal can not be sued; the fifth, sixth, and seventh are cases in which either [252] the principal or the agent may be sued.

Exception 1.—Where an agent contracts by deed in his own name. (*z*)

This exception is merely an application of the rule (*a*)

(*u*) Bright v. Hutton, 3 H. L. C. 341.

(*z*) Story, Agency, s. 261. See Chapter V.

(*z*) Conf. Rule 17, Exception 1. The remarks there made apply, mutatis mutandis, to actions against an agent.

(*a*) Rule 48. Appleton v. Binks, 5 East, 148; Berkeley v. Hardy, 5 B. & C. 355; White v. Cuyler, 6 T. R. 176; Wilks v. Back, 2 East, 142. Leake, Contracts, 290.

[1] And a trustee of a voluntary association, in whose name bibles are taken for convenience, will not be liable personally for acts done within the scope of his authority as such trustee Stevenson v. Mathers, 67 Ill. 123.

that the person to be sued on a contract by deed is the person with whom the contract is expressed by the deed to be made.

Exception 2.—Where an agent draws, indorses, or accepts a bill of exchange in his own name.

An agent is personally liable "to third persons on his drawing, indorsing, or accepting, unless he either sign his principal's name only, or expressly state in writing his ministerial character, and that he signs only in that character; 'unless,' to use the words of Lord ELLENBOROUGH, (*b*) 'he states upon the face of the bill that he subscribes it for another; unless he says plainly, I am the mere scribe.' Thus, where the defendant, the agent of a banker, drew the following bill, 'Pay to the order of A. £50 value received, which place to the account of the Durham Bank as advised,' and subscribed his own name, it was held that the defendant was personally answerable, (*c*) and he alone, though the plaintiff, the payee, knew that he was only an agent." (*d*)[1]

Though "the rule of law, as to simple contracts in writing other than bills and notes, is, that parol evidence

(*b*) Leadbitter v. Farrow, 5 M. & S. 345.
(*c*) Sowerby v. Butcher, 2 C. & M. 368; 4 Tyr. 320.
(*d*) Byles on Bills, 8th ed., 33.

[1] A note which mentions no principal, but is merely signed A. B., "agent," will bind A. B. alone, even where similarly signed notes had been assumed by A. B.'s employers. See Williams v. Robbins, 16 Gray, 77; Dubois v. Canal Co., 4 Wend. 285; Woodbury v. Blair, 18 Iowa, 572; Bickford v. Bank, 42 Ill. 238; Rand v. Hale, 3 W. Va. 495; and consult Moss v. Livingston, 4 Comst. 208; Hovey v. McGraith, 2 Conn. 680; Rossiter v. Rossiter, 8 Wend. 494; Emmerson v. Providence, &c., Co., 12 Mass. 237; Bradlee v. Mf'g Co., 16 Pick. 347; Long v. Coburn, 11 Mass. 97; Ballou v. Talbot, 16 Id. 461; Roberts v. Bulton, 14 Vt. 195; Campbell v. Baker, 2 Watts, 83; Hovey v. Magill, 2 Conn. 680; but see De Witt v. Walton, 5 Selden, 571; Rice v. Grove, 22 Pick. 158.

is admissible to charge unnamed principals, . . . but is inadmissible for the purpose of discharging the agent who signs, as if he were principal, in his own name, . . . yet it is conceived that the law as to negotiable instruments is different in one respect: to wit, [253] that where the principal's name does not appear, he s not liable on a bill or note as a party to the instrument." (*e*)

Exception 3.—Where credit is given exclusively to the agent.

It is possible that a third party with whom an agent contracts as an agent on behalf of a known principal may be willing to give credit to A., the agent, and not be willing to give it to P., the principal. The party so dealing with the agent can not afterwards sue the principal. Thus, where T. sells goods to A. for the use of P., who is known to be A.'s principal, but gives credit exclusively to A., he can not, after having treated A. throughout as the party with whom he contracts, treat P. as the party liable; (*f*) for "if the principal be known to the seller at the time when he makes the contract, and he, with a full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and can not afterwards charge the principal." (*g*)

Debiting the agent is one proof that credit was given to him exclusively, but this fact may also appear either from the contract itself or from other circumstances. Where, for instance, an agent in England buys for a foreigner resident abroad, the agent is generally to be considered as pledging his own credit, because it is highly improbable that the seller would have given credit to a foreigner. (*h*) But the question to whom was credit given is in all cases one of intention, to be answered

(*e*) Byles on Bills, 8th ed., 34, 35. See Pentz v. Stanton, 10 Wend. 271; Leadbitter v. Farrow, 5 M. & S. 345; Bult v. Morrell, 12 Ad. & E. 745; 10 L. J. 52, Q. B. Compare Lindus v. Bradwell, 5 C. B. 583; 17 L. J. 121, C. P.

(*f*) Addison v. Gandasequi, 2 Smith, L. C., 6th ed., 313.

(*g*) Thomson v. Davenport, Ibid., 337, per LITTLEDALE, J.

(*h*) Mahoney v. Kekule, 23 L. J. 54, C. P.; 14 C. B. 390.

either from the contract or, where that is doubtful, from the facts. (*i*) [1]

[254] *Exception* 4.—Where an agent contracts for persons incapable of contracting.

If an agent contracts for persons incapable of contracting, the agent is ordinarily held personally liable. Thus, where certain persons, on behalf "of a parish in England, made an agreement with the plaintiff to pave the streets of the parish, and to pay him therefor, it was held that the persons so contracting were personally liable, for the parishioners, as such, could not be sued therefor. (*k*) So where an overseer of the poor in England contracted with tradesmen upon account of the poor, and upon his own credit, it was held, that, as soon as he received so much of the poor's money, it became his own debt. (*l*) So where the business of a voluntary eleemosy-

(*i*) Thomson v. Davenport, 2 Smith, L. C., 6th ed., 327.

(*k*) Meriel v. Wymandsold, Hardres, R. 205.

(*l*) Anon., 12 Mod. R. 559. See Lambert v. Knott, 6 Dowl. & Ryl. 127. Cullen v. Duke of Queensbury, 1 Bro. Ch. R. 101 ; S. C., 1 Bro. Parl. Cases, by Tomlins, 396 ; Lancaster v. Fricker, 1 Bing. R. 201. See Hoskyns v. Slayton, Cas. Temp. Hard. 376.

[1] Where the agent induces the credit to be given to himself without expressly disclosing his agency, he becomes liable to those acting upon such credit. Evans v. Dunbar, 117 Mass. 546; Hovey v. Magill, 2 Conn. 680; Reed v. Latham, 40 Id. 452; Hall v. Bradbury, Id. 32; Pentz v. Stanton, 10 Wend. 271; Spencer v. Field, Id. 87; Newhall v. Dunlap, 2 Shepl. 180; Goodwin v. Bowden, 54 Me. 424; Bell v. Mason, 10 Vt. 509; Savage v. Rix, 9 N. H. 263; Despatch Line v. Bellamy, 12 Id. 229; Campbell v. Baker, 2 Watts, 83; Harper v. Hampton, 1 Harr. & J. 622; York Co. Bk. v. Stein, 24 Md. 447; Deming v. Bullitt, 1 Black. 241; Rosenthal v. Myers, 25 La. Ann. 463; Haverhill Ins. Co. v. Newhall, 1 Allen, 130; Gay v. Bates, 99 Mass. 263; Wilder v. Cowles, 100 Id. 487; Simonds v. Heard, 23 Pick. 120; Ballou v. Talbot, 16 Mass. 461; Taber v. Cannon, 8 Metc. 460; Fullam v. Brookfield, 9 Allen, 1; Cent. Bridge v. Butler, 2 Gray, 130; M'Clellan v. Parker, 27 Mo. 162; McCurdy v. Rogers, 21 Wis. 197; Saveland v. Green, 36 Id. 612.

nary society was conducted by a committee, it was held, that they were personally responsible to a baker who supplied the establishment with bread at their request; (*m*) for it might be fairly presumed that he looked to the committee for payment, and not to the subscribers at large." (*n*) But the presumption is one which can be rebutted; for the person dealing with the agent may have known that he had no authority to bind his principals (*e. g.*, the members of the society), and yet have been content to deal with the agent, not upon his personal credit, but upon the chance of being paid by his employees; and in this case the agent is clearly not liable. (*o*)

Exception 5.—Where the contract is made by the agent himself, *i. e.*, where the agent is treated as the actual party by whom the contract is made, or in other words, where the agent, though acting as such, incurs a personal responsibility.

"A person who is acting for another, and known [255] by him with whom he deals to be so acting, may and will be personally liable if he contracts as a principal, and that whether he contracts by word of mouth or in writing. The difference is, that, if the contract is by word of mouth, it is not possible to say from the agent using the words 'I' and 'me,' whereas if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is, that he binds himself personally, and, accordingly, he is taken to do so. . . . . It is well settled that an agent is responsible, though known by the other party to be an agent, if, by the terms of the contract, he makes himself the contracting party." (*p*)

(*m*) Burls v. Smith, 7 Bing. R. 705. See Doubleday v. Muskett, 7 Bing. R. 110.

(*n*) Story, Agency, s. 285.

(*o*) Ibid., s. 287.

(*p*) Williamson v. Barton, 31 L. R. 174, Ex., judgment of BRAMWELL, B. See Story, Agency, s. 269; Higgins v. Senior, 8 M. & W. 834; 11 L. J. 199, Ex.; Parker v. Winlo, 7 E. & B. 942; 27 L. J. 49, Q. B.; Lennard v. Robinson, 5 E. & B. 125; 24 L. J. 275, Q. B. Compare Fisher v. Marsh, 34 L. J., 177 Q. B.; 6 B. & S. 411. If, however, credit is given to the agent exclusively, the case falls within Exception 3.

If the contract is by word of mouth, it is merely a question of evidence whether the agent intended to make himself a party to the contract. If the contract is in writing, the question of an agent's liability depends upon points of interpretation. Thus a charter-party is made between A., "agent for P.," and T., and signed by A., without any restriction. A. is personally liable. (*q*)

A contract is entered into by A., who appears in the body of it to be the contracting party, but who signs it "by authority of, and as agent for, P., a merchant abroad." A. is personally liable; (*r*) since "many cases have decided that it is not sufficient to free the parties to a contract from personal liability, that they state in the contract that they enter into it as agents for another person; but that the whole instrument is to be looked at in order to see whether the contract is made by them as principals [256] or as agents." (*s*) So, again, à fortiori, where A. contracts in his own name without mentioning his principal, though the fact of his being an agent is known to the other party, A. is personally liable. (*t*) But where a charter-party was signed "for P. of L——, A. as agent," A. was held not personally liable, on the ground that it would require extremely strong words in the body of the contract to control the effect of that form of signature, (*u*) and where A. signed "for P. and Co.," A. was held not liable. (*x*) The fact, however, that an agent is clearly liable on a written contract, does not free his principal from liability; for, though a person who appears to be liable on the face of a written contract can not give evidence to show that he is not liable (since to do this would

(*q*) Parker v. Winlo, 7 E. & B. 942; 27 L. J. 49, Q. B.

(*r*) Lennard v. Robinson, 5 E. & B. 125; 24 L. J., 275, Q. B.

(*s*) Lennard v. Robinson, 24 L. J., 277, Q. B., judgment of COLERIDGE, J.

(*t*) Higgins v. Senior, 8 M. & W. 834; 11 L. J. 199, Ex.; but conf. Wake v. Harrop, 31 L. J., 451 Ex.; 1 H. & C. 202 (Ex. Ch.). Price v. Walker, L. R. 5, Ex. 173.

(*u*) Deslandes v. Gregory, 2 E. & E. 610; 30 L. J. 36, Q. B. (Ex. Ch.); but conf. Reid v. Dreaper, 30 L. J. 268, Ex.; 6 H. & N. 813; Cooke v. Wilson, 26 L. J. 15, C. P.; 1 C. B., N. S., 153. Wilson v. Zulueta 19 L. J., 49, Q. B.

(*x*) Redpath v. Wigg, L. R. 1, Ex. 335 (Ex. Ch.).

be to contradict the written contract), there is nothing to prevent the production of evidence that a person who is not liable on the face of a contract is in reality chargeable under it. (*y*)

Exception 6.—Where the agent is the only known or ostensible principal, or where a contract (not under seal) has been made by an agent in his own name for an undisclosed (*z*) principal. (*a*)

A. contracts with T. in reality as an agent for P., but it is not known or stated to T. that A. is contracting as an agent. A. contracts with T., and states himself to be an agent, but does not give T. the name of his [257] principal, P. In either case T. may, on discovering that P. is principal, sue either P. or A.[1]

Exception 7.—Where money received by an agent for his principal has been paid under a mistake of fact, or obtained by means of a tort.

Payment to a clerk, servant, or other agent, being payment to his employer or principal, (*f*) the person who pays money under circumstances which give him a right to recover it back may always sue the principal, and, as a general rule, can not sue the agent. (*g*) But a person who has a right to recover money from a principal may also sue the agent to whom the money is actually paid in the following cases.

If T. pays money to A. for P. in consequence of a mis-

(*y*) Garrett v. Handley, 4 B. & C. 664; Bateman v. Phillips, 16 East, 356 (Ex. Ch.); Patterson v. Gandasequi, 15 East, 62; 2 Smith, L. C., 6th ed., 313; Sowerby v. Butcher, 2 C. & M. 368; 4 Tyr. 320; Lefeuvre v. Lloyd, 5 Taunt 749; 1 Marsh, 318; Higgins v. Senior, 8 M. & W. 844, 845.

(*z*) For meaning of "undisclosed" principal, see *ante*.

(*a*) See Sims v. Bond, 5 B. & Ad. 389; 2 Smith, L. C., 6th ed., 355; Patterson v. Gandasequi, Ibid., 313; Thomson v. Davenport, Ibid., 327.

(*f*) Paley, Agency, 388; Smith, Master and Servant, 2nd ed., 227; Duke of Norfolk v. Worthy, 1 Camp. 337.

(*g*) Sadler v. Evans, 4 Burr. 1984; Edden v. Read, 3 Camp. 339; conf. Stephens v. Badcock, 3 B. & Ad. 354; Bamford v. Shuttleworth, 11 A. & E. 926.

[1] See two preceding notes.

take of fact, T. may, on giving notice to A., and provided A. has not paid the money over, or done what is equivalent to paying it over, bring an action against A. for its recovery. For "it is clear law that an agent who receives money for his principal is liable as a principal as long as he stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it." (*h*) Where A. sold to T. a bar of silver received from P., his principal at Gibraltar, and, owing to a mis calculation as to the number of ounces in the bar, T. paid A. more than the price agreed upon, it was held that T. could sue A. for money received, it being admitted that no money had been paid by the defendant to his principal, nor any other thing done to create a change of circumstances. (*i*.) So where money is paid by
[258] mistake to an agent, and placed by him to the account of his principal, but not paid over, an action will lie against the agent at the suit of the person paying the money; for the mere passing such money in account without any fresh bills accepted or further sums advanced for the principal in consequence of it, is not equivalent to the payment of it over. (*k*)

"The principle, in short, of law is clear, that if money be mispaid to an agent for the use of his principal, and the agent has paid it over, he is not liable to an action by the person who mispaid it, because it is just that one man should not be a loser by the mistake of another; and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand, it is just, that, as the agent ought not to lose, so he should not be a gainer by the mistake; and, therefore, if after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake, the agent can not afterwards pay it over to his principal without making himself liable

(*h*) Cox v. Prentice, 2 M. & S, 344, per ELLENBOROUGH, C. J.
(*i*) Ibid.
(*k*) Buller v. Harrison, Cowp. 565.

to the real owner for the amount." (*l*) It is, however, essential in order to fix the agent with liability, that he should not have paid the money over, or done anything equivalent to paying it over before he receives notice not to pay it. (*m*) But if the agent knows that the person paying the money intends to dispute his right to detain it, and if such person has given him notice thereof, and the agent in consequence hastens the payment over to his principal, his doing so is a species of fraudulent act for which he may be liable to the person from whom the money is received. (*n*)

The doctrine that an agent is not liable to be sued for money received to the use of his principal, does not apply to cases where the agent gets the money into his hands by means of a tortious act, whether the [259] wrongful act was committed by the orders of his employer or not. For all persons concerned in a tort are principals, (*o*) and as the party injured might bring an action against the servant for damages sustained in consequence of his wrongful act, so he may waive his right to proceed in that form of action, and sue for the money received by the wrong-doer. And in such cases it is no defense that the agent has paid over the money received to his principal. Where A., by the direction of P., his father, who claimed to be executor of T.'s deceased wife, took from a box of T.'s, money, which A. asserted to belong to his father, and paid it over to him, it was held, that A., though he acted as an agent, was liable to T. in an action for money received, (*p*) since "the defendant was a wrong-doer in taking the money, and would have been liable to the plaintiff in trespass. The plaintiff, however, waives the tort, and sues the defendant for money had and received; and the defendant can not relieve himself from liability by paying over the money

(*l*) Ibid., per MANSFIELD, C. J.

(*m*) Holland v. Russell, 1 B. & S. 424; 30 L. J. 308, Q. B.; 4 B. & S. 14; 32 L. J., 297, Q. B. (Ex. Ch.).

(*n*) Ibid., 32 L. J., 298, Q. B. (Ex. Ch.), judgment of ERLE, C. J.

(*o*) See Chapter XXV.

(*p*) Tugman v. Hopkins, 4 M. & G. 389.

to another, as he might have done had the original taking been lawful. This circumstance distinguishes the . . . case from Stephens v. Badcock, (*q*) for there the defendant received the money as agent for a party who was entitled to receive it, whereas here the receipt was altogether wrongful, and it must be taken with all its consequences." (*r*)

So where an action was brought against the governor of a prison for an extortionate charge exacted from a prisoner, it was held no defense that he had accounted to the proper authorities for all sums received on account of the jail. (*s*)

Exception 8.—Where an agent has signed certain contracts on behalf of a limited company without using the word "limited."

[260] The Companies Act, 1862, contains stringent provisions to compel limited companies (*t*) and their officers to use the word "limited," as part of the name of the company in matters relating to its business, (*u*) and persons signing or authorizing the signature on behalf of a limited company of any bill of exchange, promissory note, check, or order for money or goods, in which the word "limited" is not used as directed, are themselves liable for the amount unless the same is duly paid by the company. (*v*)

The right to sue either the principal or the agent at the option of the plaintiff is subject to certain limitations intended to secure justice to all the parties concerned.

1st. The right to sue either the principal or the agent, is a right of choice.

"The very expression, that . . . the contractee has an election to sue agent or principal, supposes that he

(*q*) 3 B. & Ad. 354.

(*r*) Tugman v. Hopkins, 4 M. & G. 400–402, judgment of TINDAL, C. J.

(*s*) Miller v. Aris, 3 Esp. 231.

(*t*) See Chapter XIV., *post*.

(*u*) Companies Act, 1862, ss. 41, 42.

(*v*) Ibid., s. 42; Penrose v. Martyr, E. B. & E. 499; 28 L. J. 28, Q. B.; 1 Lindley, Partnership, 2nd ed., 389.

can only sue one of them,—that is to say, to judgment. For it may be that an action brought against one might be discontinued, and fresh proceedings be well taken against the other." (*w*)

Hence where an action has been brought against the master of a ship and prosecuted to judgment, a separate action can not be maintained for the same cause of action against the owner. (*x*)

2ndly. The right to sue either the principal or the agent may be barred by circumstances, which show that its exercise would work injustice to the party sued.

The chief, though not, perhaps, the only case in which the creditor loses his right to sue the principal, is where the creditor has so dealt with the agent as to place the principal in a worse situation than he ought to [261] be in. (*y*) "Although the person who has dealt with an agent believing him to be a principal, may elect to treat the after-discovered principal as having contracted with him; (*z*) still, if the principal, following the ordinary course of business, has, after his liability to the contractor is complete, altered the state of his accounts with the agent, this right of the contractor exists subject to the state of those accounts." (*a*) Hence it has been laid down, that "if the principal has paid the agent, or if the state of the accounts between the agent and the principal would make it unjust that the seller should call upon the principal, the fact of payment or such a state of accounts would be an answer to an action brought by the seller, where he had looked to the responsibility of the agent;" (*b*) and the law on the subject has thus been somewhat more precisely summed up by Lord ELLENBOROUGH, C. J.:—"A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought. . . If he

(*w*) Priestley v. Fernie, 34 L. J. 175, Ex., judgment of BRAMWELL, B.
(*x*) Ibid., 172, Ex.; 3 H. & C. 977.
(*y*) See Heald v. Kenworthy, 10 Exch. 745, judgment of POLLOCK, C. B.
(*z*) See *ante*.
(*a*) Thomson v. Davenport, 2 Smith, L. C. 6th ed., 347, notes.
(*b*) Ibid., 335, judgment of BAYLEY, J.

lets the day of payment go by, he may lead the principal to suppose that he trusts solely to the broker; and if in this case the price of the goods has been paid to the broker, on account of the deception, the principal shall be discharged." (*c*)

In order to deprive the creditor of his right of action against the principal, it is necessary that something in the course of proceeding on the creditor's own part should have placed the principal in a worse position than he otherwise would have been in; and hence mere payment by the principal to the agent of the money to be paid to the creditor does not, in spite of the expressions used in Thomson v. Davenport, of itself discharge the [262] principal from liability. The law is thus laid down by PARKE, B.:—"The plea simply states that after the contract was entered into between the plaintiffs and a third party, the agent of the defendant, under circumstances which rendered the defendant liable upon it, the latter paid the agent. I am of opinion that this is no defense to the action. There are no doubt cases and dicta which, unless they be understood with some qualification, afford ground for the position taken by the counsel for the defendant" (*sc.*, that the mere fact of payment to the agent discharged the principal). But "there is no case where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position." (*d*) It is, in short, necessary in order to exempt the principal from being sued, that something must occur to make it unjust to call upon him for payment: as, for instance, where the seller tells the principal that he will look to the agent for payment, and the principal in consequence pays the agent. (*e*) The same principle applies to the right to sue the agent. Thus, as has been already pointed out, a person who under a mistake pays money to an agent for a principal, can not recover it back from the former after

(*c*) Kymer v. Suwercropp, 1 Camp. 112, judgment of ELLENBOROUGH, C. J.
(*d*) Heald v. Kenworthy, 10 Exch. 745, 746, judgment of PARKE, B.
(*e*) Ibid., 744, per PARKE, B.

he has paid it over to his employer, since it would be unjust then to sue the agent.

RULE 54.—An agent who, without having authority, enters into a contract on behalf of a principal, can not himself be sued on the contract, but is otherwise liable.[1]

Where a person, though without authority, enters into a contract professedly as agent for another person, he can not be sued for a breach of the contract. "I [263] think," says Lord CAMPBELL, C. J., "that where it clearly and expressly appears that a person really acting as agent fairly contracts as such agent in the name of his principal, and professes to make that principal liable, the agent is not liable to be sued upon the contract. He may be sued so as to make him liable in damages for the loss sustained by the person with whom he has entered into the contract. But to say that he is personally liable upon a contract which he really makes as agent, would be to make a contract instead of construing that which the parties themselves have made." (*f*)

(*f*) Lewis v. Nicholson, 21 L. J. 316, Q. B., judgment of CAMPBELL, C. J.; Jenkins v. Hutchinson, 13 Q. B. 744; 18 L. J. 274, Q. B.; Thomson v. Davenport, 2 Smith, L. C., 6th ed., 340–346; Godwin v. Francis, L. R. 5 C. P. 295.

[1] Consult Williams v. Robbins, 16 Gray, 77; Ogden v. Raymond, 22 Conn. 379; Taylor v. Shelton, 30 Id. 122; Meek v. Smith, 7 Wend. 315; Grafton Bank v. Flanders, 4 N. H. 237; Underhill v. Gibson, 2 Id. 352; North Bk. v. Pepoon, 11 Mass. 292; Jefts v. York, 4 Cush. 371; Bank v. Hooper, 5 Gray, 567; Brown v. Parker, 7 Allen, 337; Tucker Man. Co. v. Fairbanks, 98 Mass. 101; Baltgen v. Nicolay, 53 N. Y. 467; Bartlett v Tucker, 104 Mass. 336; Merchants' Bk. v. Spieer, 6 Wend. 443; Hampton v. Specknagle, 9 S. & R. 212; Hopkins v. Mehaffy, 11 S. & R. 126; Locke v. Alexander, 1 Hawks, 416; Lazarus v. Shearer, 2 Ala. 718; Duncan v. Niles, 32 Ill. 532; Fuller v. Hooper, 3 Gray, 334; Bartlett v. Tucker, 104 Mass. 336; Lander v. Castro, 43 Cal. 497; Bozza v. Rowe, 30 Ill. 178.

Though the agent can not be sued upon the contract, he may be sued so as make him liable in damages.

If he has fraudulently represented himself to have authority, he is liable to an action for false representation, (*g*) and whether his representation be fraudulent or not, he can be sued for a breach of the implied contract that he had authority to contract; (*h*) for "a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts, for any damages sustained by reason of the assertion of authority being untrue. This is not the case of a bare mis-statement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he [264] sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist." (*i*)

A. fraudulently represents to T. that he has authority to contract for P. with intent to deceive. A., when he has no authority from P. and knows it, nevertheless makes a contract with T. as having such authority. A., though not having, in fact, any authority to contract as agent of P. with T., yet does so under the bonâ fide belief that he has authority, *e. g.*, from having received a forged power of attorney, T. can, in the first and

(*g*) Thomson v. Davenport, 2 Smith, L. C., 6th ed., 346.

(*h*) Ibid., Collen v. Wright, 7 E. & B. 301; 26 L. J. 147, Q. B.; 8 E. & B. 647; 27 L. J. 215, Q. B. (Ex. Ch.); Randell v. Trimen, 18 C. B. 786; 25 L. J. 307, C. P.; Spedding v. Nevell, L. R. 4, C. P. 212; Godwin v. Francis, L. R. 5, C. P. 295.

(*i*) Collen v. Wright, 8 E. & B. 657, 658, judgment of WILLES, J.

second of these cases, sue A. for false representation, and in all of them for a breach of the implied contract, that he has authority to contract as agent of P. (*k*)

It would appear that if one person without authority accepts bills on behalf of himself and others, he is liable in an action on the bill.

Hence where A., without authority, accepted a bill for a company or partnership of which he was a member, in the following terms: "A. accepted per proc. P. and C. Mining Company;" it was held that he was personally liable. (*l*)[1]

Exception.—Where the authority of an agent has without his knowledge expired at the time of his making the contracts.

If an agent has received authority to contract for his principal, and the authority has expired by the death of the principal without the knowledge of the agent, and the agent, though his authority has expired, believes himself to have, and contracts as having, authority, he is not liable to an action.

A wife, during the absence of her husband [265] abroad, contracted as his agent for goods to be supplied for her; it was held that she was not liable for the price of goods supplied after his death, and before information of it reached her. (*m*) "All the cases in which the agent has been held personally responsible will be found to arrange themselves under one or other of these three classes. . . . It will be found that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such

(*k*) Thomson v. Davenport, 2 Smith, L. C., 6th ed., 327.

(*l*) Nicholls v. Diamond, 23 L. J. 1, Ex.; 9 Exch. 154; Owen v. Van Uster, 20 L. J. 61, C. P.; 10 C. B. 318.

(*m*) Smout v. Ilbery, 10 M. & W. 1; 12 L. J. 357, Ex. Compare Blades v. Free, 9 B. & C. 167. See Chapter XVI.

[1] See last note.

information to the other contracting party as would enable him, equally with himself, to judge of the authority under which he proposed to act. . . . Here the agent had, in fact, full authority to contract, and did contract in the name of the principal. . . . The continuance of the life of the principal . . . was a fact equally within the knowledge of both contracting parties. If then the true principle derivable from the cases is that there must be some wrong or omission of right on the part of the agent in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present." (*n*) Though the agent in this case was a married woman, the judgment "is founded on general principles applicable to all agents." (*o*) [1]

(*n*) Smout v. Ilbery, 10 M. & W. 10, 11, per CURIAM.
(*o*) Ibid.

[1] Carriger v. Whittington, 26 Mo. 313; and see Tiller v. Spradley, 39 Ga. 35; Aspinwall v. Torrance, 1 Lans. 381.

CHAPTER XIII.

PARTNERS AND UNINCORPORATED COMPANIES.

RULE 55.—A firm or unincorporated company can not be sued in its name as a firm or as a company, but must be sued in the names of the individual partners or members composing the firm or company. (*a*)

RULE 56.—All persons who are partners in a firm, or members of an unincorporated company, at the time when a contract is made by or on behalf of the firm or company, should be joined in an action for the breach of it. (*b*)

Where partners contract jointly, either in their individual names, X., Y., and Z., or in the name of the firm, M. and Co., they must all be sued in an action on the contract. A contract, further, made by one partner on behalf of the firm is generally to be held a contract by the firm; for each partner is, within the scope of the partnership business, an agent for his co-partners, and has authority for and on behalf of all of them to make such contracts as are necessary, proper, and [267] customary in the course of their business. (*c*)

"The liability of one partner for the acts of his co-partner is, in truth, the liability of a principal for the acts

(*a*) For an explanation of this rule, see *ante*. What is there said as to actions by, applies, mutatis mutandis, to actions against, partners.

(*b*) See Rules 13 and 21.

(*c*) Harrison v. Jackson, 7 T. R. 207, 210; Leake, Contracts, 277; Cox v. Hickman, 8 H. L. C. 268, 279; 30 L. J. 125, C. P.

of his agent. When two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his co-partners, and all are, therefore, liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or into any contracts, or that, as to certain of their contracts, none shall be liable except those by whom they are actually made; but with such private arrangements third persons dealing with the firm without notice have no concern. The public have a right to assume that every partner has authority from his co-partner to bind the whole firm in contracts made according to the ordinary usages of trade." (*d*) The partnership, therefore, X., Y., and Z., are bound by, and should be sued on, any contract made by X. on their behalf, provided it be one within the scope of his authority as a partner. (*e*)

[268] The rule is modified by the existence of dormant and nominal partners.

A dormant partner (*f*) always may be joined in an action against the firm. (*f*) Thus, if X. and Y. are osten-

(*d*) Cox v. Hickman, 8 H. L. C. 304, judgment of Lord CRANWORTH. Compare the judgment of the Court in Hawken v. Bourne, 8 M. & W. 703, 710.

(*e*) In determining whether a given transaction is within the limit of X's authority, the following distinction should be borne in mind:—

Certain contracts are prima facie within the authority of the member of an ordinary firm. Thus a partner may, as such, in general, draw, accept, or indorse bills of exchange in the name of the firm (Harrison v. Jackson, 7 T. R. 207, 210; Norton v. Seymour, 3 C. B. 792; Carter v. Whalley, 1 B. & Ad. 11; Stephens v. Reynolds, 5 H. & N. 513; 29 L. J. 278. Ex.).

There are other contracts which a partner, as such, has no power to enter into on behalf of the firm. Thus a partner can not execute a deed without an authority under seal to do so (Harrison v. Jackson, 7 T. R. 207), and the power of a partner to bind his firm depends to a great extent upon the nature of the partnership business. As a partner, in short, occupies the position of an agent, the extent of his authority to bind his principal (the firm), will be found to be partly a question of law, and partly a question of fact. He has, speaking generally, that authority which a person dealing with the firm would, under the whole circumstances of the case, be justified in supposing him to possess.

(*f*) See *ante*.

sible partners, and Z. a dormant partner, an action may always be brought against X., Y., and Z., even by a person who, at the time he entered into the contract sued upon, did not know of Z.'s existence; for persons who deal with the firm are "entitled to hold all who are partners bound by the primâ facie authority conferred on the manager, and that equally, whether the persons sought to be charged were persons to whom the creditors gave credit, or dormant partners, of whose existence they were unaware. I think the justice of this rule, as applicable to dormant partners, very questionable; but I do not think it open to question that it is the rule of law." (*g*)

When, therefore, it is intended to sue a person as a dormant partner, what is to be considered is not whether credit was given to him, but whether, as a matter of fact, he was a partner at the time the contract was entered into. His liability depends, not upon his having shared in the profits, but upon the business having been carried on on his behalf, *i. e.*, upon his having stood in the position as principal towards the other partners.

A dormant partner never need be joined where the other partner or partners have led the plaintiff to suppose that he or they alone constitute the firm. (*h*) If, for example, a person carries on a business in his [269] own name, *e. g.*, as X., a plaintiff can not be compelled in an action against him to join a dormant partner, Y. (*i*.) At the same time, the person who deals with a firm, *e. g.*, X. and Co., can not treat X. (supposing the firm in reality to consist of X. and Y.) as solely liable simply because the creditor supposed that X. was the only person in the firm.

"If a party contracting with another delivers an invoice made out to a firm, and nothing is said as to the parties composing the firm, and he afterwards brings an action against the individual, he takes his chance of that

(*g*) Cox v. Hickman, 8 H. L. C. 278, opinion of BLACKBURN, J.; Ibid., 312 313, judgment of Lord WENSLEYDALE.

(*h*) 1 Lindley, Partnership, 2nd ed., 485, 486; Bonfield v. Smith, 12 M. & W. 405; 13 L. J. 105, Ex.; De Mantort v. Saunders, 1 B. & Ad. 398.

(*i*) Mullett v. Hook, 1 M. & M. 88.

individual being the only person in the firm. If, indeed, the party represents himself as the only person composing the firm, an action may be brought against him alone; or if, on being asked who are his partners, he refuses to give any information, that may be evidence for the jury, whether he did not hold himself out as solely liable. But a party can not succeed against one of several partners because he supposes him to be alone liable. It ought to be shown, in point of fact, either that the defendant is solely liable or that he represented himself to be so. In the present case, as the plaintiff knew that (X.) and Co. constituted a firm, it was his duty to be satisfied as to the parties of whom the firm consisted." (*k*)

A nominal partner (*l*) always may be joined in an action against the firm brought by a person to whom he holds himself out, or, rather, suffers himself to appear, as a partner. A person, therefore, who holds himself out to the world, *i. e.*, to every one dealing with the firm, as a partner, can always be sued.

[270] But where the nominal partner has never been known as such to a particular person, it would rather appear (*m*) that such person can not join him in an action against the firm, for "the rule which imposes on a nominal partner the responsibilities of a real one, is framed in order to prevent those persons from being defrauded or deceived who may deal with the firm. But where the person dealing with the firm has never heard of him as a component part of it, that reason no longer applies." (*n*) A plaintiff's right to sue a nominal partner depends

(*k*) Bonfield v. Smith, 13 L. J. 106, Ex., judgment of Lord ABINGER, C. B.

It is otherwise if the ostensible partners held themselves out as being the only members of the firm. When they have done this they can not insist upon the plaintiff joining the dormant partners as co-defendants (De Mantort v. Saunders, 1 B. & Ad. 398).

(*l*) See *ante*.

(*m*) See *contra* Young v. Axtell, cited Waugh v. Carver, 1 Smith, L. C., 6th ed., 846, where it is stated by Lord MANSFIELD, "that as the defendant had suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not at her time of dealing know that she was a partner or that her name was used" (Ibid., 847).

(*n*) Waugh v. Carver, 1 Smith, L. C., 6th ed., 860.

upon its being proved "that the defendant held himself out, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner." (*o*) The rule as to a nominal partner's liability to be sued may, if this view of his position be correct, be thus summed up. He is simply an apparent partner, and may be sued by any person to whom he appears to be a partner, but can not be sued by any person to whom he has not appeared to be a partner.

A partner, or member of an unincorporated company, can not be sued on a contract made before he joined the firm or company, since he was not one of the persons by whom the contract was made. If, indeed, Z. joins the firm of X. and Y., it may sometimes be the result of transactions between the firm and its creditors that the latter are to look for payment of their debts, not to the old firm, X. and Y., by whom they were contracted, but to the new firm, X., Y., and Z. But in this case, Z. is, in effect, liable, not on the original contract [271] made before he joined the firm, but on a new contract made by him and his partners.

A retired partner, or member of an unincorporated company, may be sued on any contract made whilst he was a partner of the firm, or member of the company. If, that is to say, a contract is made by the firm of X., Y., and Z., Z., though he retires from the firm, remains liable on his contract. (*q*)

Exception.—One partner must or may be sued alone on contracts made by him on behalf of the firm, in the same cases

(*o*) Dickinson v. Valpy, 10 B. & C. 140, per PARKE, J.; and compare Shott v. Streatfield, 1 M. & Rob. 9; Alderson v. Popes, 1 Camp. 404.

(*q*) A partner's liability may continue to exist after he has actually retired from the firm, if notice has not been given of his retirement. (Newsome v Coles, 3 Camp. 621.) Publication in the Gazette is a sufficient notice to all who have not had dealings with the partnership before the change, but partners remain liable for the acts of one another to all persons who have had dealings with the firm, until such persons receive particular notice of the dissolution of partnership. (Farrer v. Defflime, 1 C. & K. 580.)

in which an agent must or may be sued on contracts made by him on behalf of his principal. (*r*)

Each partner is an agent of his co-partners within the scope of the partnership business. Hence he must be sued alone on contracts made by the firm (his principals) in cases in which an action must be brought against an agent, *e. g.*, when he has contracted by deed in his own name; (*s*) and he may be sued alone in the cases in which an agent may be sued, instead of his principal, *e. g.*, when he has contracted (not under deed) on behalf of the firm, but in his own name. (*t*)[1]

Set-off.—Debts due to one partner, X., can not be set-off against debts due from the firm, X., Y., and Z.;
[272] nor can debts due to the firm, X., Y., and Z., be set-off against debts due from one partner, X. (*u*)

This principle is subject to the following exception:

Where one partner is or has become (*e. g.*, by the death of his co-partners) the only person who can be sued for a debt due from the firm, he may set-off a debt due to himself individually; (*v*) and it would seem that he can, in

(*r*) See *ante*.

(*s*) Rule 53, Exception 1. See, further, Eastwood v. Bain, 5 H. & N. 738; 28 L. J. 74, Ex.; Bottomley v. Nuttall, 5 C. B., N. S., 122; 28 L. J. 110, C. P.; Byles on Bills, 8th ed., 34; 1 Lindley, Partnership, 2nd ed., 244. In one exceptional case partners may be liable on a bill to which they are not parties. This is where a bill is drawn upon a firm, and accepted by one partner in his own name only.

(*t*) Rule 53, Exception 5.

(*u*) See *ante*.

(*v*) Fletcher v. Dyche, 2 T. R. 52.

[1] In Leslie v. Wiley, 47 N. Y. 649, it was held that where one assumes to act as agent for one member of a firm in the sale of property belonging to the firm, and his action is ratified by the assumed principal by receipt of the money paid on the sale, the purchaser being ignorant of the existence of the partnership, the other partners need not be made parties to an action to recover back the money paid, on the ground of fraud on the part of the agent, or for mistake, since the division of the money by the declared principal among persons who were strangers to the plaintiff in the transaction, will not affect his liability.

the like case, in an action for a debt due from him individually, set-off a debt due to him as representing the firm, *e. g.*, as surviving partner. (*x*)

An action for a debt due from a firm is sometimes, in order to avoid a set-off, brought against one of several partners only. His remedy is to plead the non-joinder of his co-partners in abatement. But if X., the partner sued, is for any reason unable to plead the non-joinder of his co-partners, Y. and Z., he can not, it would seem, take any advantage in the way of set-off of debts due from the plaintiff to the firm, X., Y., and Z. (*y*)

RULE 57.—Actions on contracts made by a firm;

1. Can not on the bankruptcy of the firm be brought either against the trustee or (as a general rule) against the individual partners.

2. Must on the bankruptcy of one or more partners be brought against the solvent partner or partners. (*z*)

There is no remedy by action against a trustee in respect of the bankrupt whom he represents. (*a*) [273] The remedy is by proof against the bankrupt's estate, or by an action against him if his order of discharge is no bar to the claim. When, therefore, it is desired to recover a debt or damages for breach of contract, due from a firm of which all the partners are bankrupt, an action is not the remedy, unless the partners have not obtained their discharge, or unless the claim is one which can not be proved in bankruptcy. (*b*)

(*x*) See Slipper v. Sidstone, 5 T. R. 493; Golding v. Vaughan, 2 Chit. 436.

(*y*) Stackwood v. Dunn, 3 Q. B. 823; 1 Lindley, Partnership, 2nd ed., 520.

(*z*) 1 Lindley, Partnership, 2nd ed., 494. Contrast with this, Rule 23. See Chapter XVII.

(*a*) 1 Lindley, Partnership, 2nd ed., 495.

(*b*) See Chapter XVII., as to the claims which are proveable, and which herefore are barred by bankruptcy, and Bankruptcy Act, 1869, s. 48.

If, however, one or more only of the partners are bankrupt the solvent partner may be sued, (*c*) and they may and should be sued alone if the bankrupt partners are discharged from the claim, and jointly with them if they are not. (*d*) Thus, if the firm of X., Y., and Z. are bankrupt, no action can be brought against their trustee, nor, if X., Y., and Z. have obtained their order of discharge, and the claim be one that is proveable, (*e*) can any action be brought against them. But if X., Y., and Z. have not obtained their discharge, or if the claim be not one to which bankruptcy is a bar, they are liable to be sued.

Suppose, again, that X. be made a bankrupt, Y. and Z. are still liable to be sued. If X. is discharged from the debt, Y. and Z. must be sued without him, and if he is not they must be sued jointly with him. (*f*)

Unincorporated companies—Winding up.—The general rule can not be applied without modification to unincorporated companies. The affairs of such companies, when insolvent, are generally settled by the company being wound up. (*g*)

[274] On a petition for winding-up being presented, actions against such companies can be stayed, and after the order for winding up, can not be brought without leave of the court. (*h*)

When an unincorporated company is registered, those persons only become members of the incorporated company who are members of the unincorporated company at the time of registration; consequently the liabilities of persons who were once members of the unincorporated company, but had ceased to be so before the time of its registration, are unaffected by the incorporation of the

(*c*) Hawkins v. Ramsbottom, 6 Taunt. 178.

(*d*) Bovill v. Wood, 2 M. & S. 23; Moravia v. Glasse, Ibid., 444; 3 & 4 Will. IV. c 42, s. 9; Bankruptcy Act 1869, s. 50.

(*e*) Chapter XVII, *post.*

(*f*) 1 Lindley, Partnership, 2nd ed., 694; Bullen, Pleadings, 3rd ed., 505 506, n. (*a*). See as to set-off in bankruptcy, *ante.*

(*g*) See 1 Lindley, Partnership, 2nd ed., 166; 2 Ibid., 1219, 1258, 1259.

(*h*) See *post.*

company, and can, therefore, supposing the company to be registered and then wound up, be enforced at law just as if the company had never been registered or ordered to be wound up. (*i*)

Companies empowered to sue, &c.—The fact that a company has stopped payment does not prevent its suing and being sued by its public officer, (*k*) and the bankruptcy of a public officer does not prevent his being sued as such, that is, the plea of the bankruptcy of a person sued as a public officer, will not be allowed to stand if the plaintiff will give an undertaking not to issue execution against the property of the defendant himself. (*l*)

RULE 58.—On the death of a partner, the surviving partners, and ultimately the last survivor or his representative, must be sued on contracts made with the firm. (*m*)

X., Y., and Z. are partners; Z. dies; an action on any contract made by the firm, *i. e.*, by X., Y., [275] and Z., must be brought against X. and Y. The same rule appears to hold good with regard to unincorporated companies, supposing they are not empowered to sue by public officer. (*n*) [1]

(*i*) 1 Lindley, Partnership, 2nd ed., 1259; Lanyon v. Smith, 3 B. & S. 938, 32 L. J. 212, Q. B.

(*k*) Davidson v. Cooper, 11 M. & W. 778.

(*l*) Steward v. Dunn, 11 M. & W. 63; Wood v. Marston, 7 D. P. C. 865; 1 Lindley, Partnership, 2nd ed., 501, 503.

(*m*) Compare Rule 24.

(*n*) See Rule 52.

[1] See ante.

CHAPTER XIV.

CORPORATIONS AND INCORPORATED BODIES.

RULE 59.—A corporation or incorporated body must be sued in its corporate name.[1]

A corporation or incorporated body must be sued in its corporate name, for the same reason for which it must sue in its corporate name, viz., that a corporation is a body distinct from the members who compose it. (*a*) It does not, however, follow from this fact, that the members of a corporation, or shareholders in a company, may not be to a greater or less degree liable to satisfy with their own property the obligations of the corporate body to which they belong. The members, it is true, of a regular corporation, *e. g.*, the mayor and aldermen of a borough, are not personally liable for the debts or obligations of the borough ; and persons who contract with such a corporation must look to its corporate funds exclusively. But the members of a company are, as a general rule, to a greater or less degree liable in their individual capacities for the obligations, (*e. g.*, contracts) incurred by the company. (*b*) [2]

(*a*) See Rule 25.

(*b*) The liability, for example, of a shareholder in a company, under 7 Will. IV. & 1 Vict. c. 73, or in a company empowered by statute to sue, &c., depends upon the terms of the charter, letters patent or statute, under which the particular company is constituted. The liability of members, again, of companies within the Companies' Clauses Consolidation Act (8 & 9 Vict. c. 16, s. 36), extends to the amount of their unpaid-up shares. Shareholders in banking companies, within 7 Geo. IV., c. 46, are liable to the full extent of their individual property ; whilst partners in companies within the Companies Act. 1862, incur a limited or an unlimited liability, according to the terms on which the company is registered. See 1 Lindley, Partnership, 2nd ed., 388, 389.

[1] Powhatan Steamboat Co. v. Potomac Steamboat Co., 36 Md. 238.

[2] Provident, &c., Institution v. Jackson, &c., Runk, 52 Mo.

In one case a member of a corporate body is [277] liable to be directly sued at law for the debts of the corporation. This case arises under the Companies' Act, 1862, s. 48:—

"If any company under this act carries on business when the number of its members is less than seven, for a period of six months after the number has been so reduced, every person who is a member of such company during the time that it so carries on business after such period of six months, and is cognizant of the fact that it is so carrying on business with fewer than seven members, shall be severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same, without the joinder in the action or suit of any other member."

In order to make a person individually liable under this section, it is necessary that, first, the company should carry on business with less than seven members for a period of six months; secondly, the person made liable should be a member during the time that the business is so carried on; and thirdly, he should be cognizant of the business being so carried on.

RULE 60.—A corporation or incorporated body can not be sued on a contract not under seal. (*c*) [1]

(*c*) See Rule 26.

577; Comanchee Mining Co. v. Rumley, 1 Mon. T., 201; State, &c., Association v. Kellogg, 52 Mo. 583; Booth v. Campbell, 37 Id. 522; Lowery v. Inman, 46 N. Y. 119; Norris v. Wrenschall, 34 Mo. 492; Mills v. Stewart, 62 Barb. 444; Union, &c., Association v. Neill, 31 Iowa, 95; Wehrem v. Reakert, 1 Cinc. (Ohio) 121; Norris v. Johnson, 34 Mo. 485; Conckling v. Furman, 48 N. Y. 527; Bartlett v. Drew, 4 Lans. 444; 60 Barb. 648; and see Basshor v. Forbes, 36 Mo. 154.

[1] But this is regulated in the United States by the statutes of the different states. Trading corporations are permitted to do many things by way of simple contracts without the common seal of the corporation, which municipal corporations are

Exception 1.—Where a corporation contracts concerning matters necessarily incidental to the purposes or business of the corporation. (*d*)

Exception 2.—Where the contract relates to matters of trivial importance, or of constant recurrence. (*e*)

[278] *Exception* 3.—In some cases of an implied contract. (*f*)

A corporation may in some instances sue on a contract implied by law, though no agreement under seal exists as a basis of the action. Thus a corporation may apparently be sued for use and occupation, (*g*) for money had and received, by a person from whom fees have been wrongfully exacted by the corporation, (*h*) and for money paid to its use, by a person who has been compelled to pay money which ought to have been paid by the corporation. (*i*)

Exception 4.—Where a corporation is authorized by statute to contract otherwise than under seal. (*j*)

RULE 61—A corporation or incorporated body can not be sued on contracts ultra vires.[1]

(*d*) Ibid., Exception 1.

(*e*) Ibid., Exception 2. It should be noticed that as regards actions against corporations there is no exception corresponding to Rule 26, Exception 3.

(*f*) Rule 26, Exception 4

(*g*) Finlay v. Bristol and Exeter Rail. Co., 7 Ex. 409; 21 L. J. 117, Ex.; Low v. London and North-Western Rail. Co., 18 Q. B. 632; 21 L. J. 361, Q. B.

(*h*) Hall v. Mayor of Swansea, 5 Q. B 526; 12 L. J. 107, Q. B. Rule 26, Exception 5.

(*i*) Jefferys v. Gurr, 2 B. & Ad. 833.

(*j*) Rule 26, Exception 5.

not allowed to do. San Antonio v. Gould, 34 Tex. 49; and consult Oxford Iron Co. v. Spradley, 46 Ala. 98; Cincinnati, &c., Assurance Co. v. Rosenthal, 55 Ill. 85.

[1] But while it is the duty of all parties who deal with a corporation, to know, as they will be presumed to know, the

Corporations derive all their powers from the charter, statute, &c., by which they are constituted; and can, therefore, have no greater capacity either to contract or to do any other act than is given them by their constitution. Any contract, therefore, entered into by or on behalf of a body corporate which is ultra vires, *i. e.*, beyond the powers of the body, or, in other words, is an agreement which the corporation is not authorized by its constitution to make, must of necessity be invalid. This doctrine has no connection with the law of agency or the rights of individual partners. It, indeed, exactly illustrates the difference between a partnership or unincorporated company and a corporate body. If all the partners in an ordinary firm, or all the shareholders in an [279] unincorporated company, were to agree to enter into a contract which had nothing to do with their original agreement of partnership with one another, they could if they pleased enter into such a contract, and it would, provided they were acting unanimously, be binding upon them. But the shareholders of a company incorporated by charter or statute can not, even though acting unanimously, do anything contrary to the charter or statute to which they owe their incorporation. (*k*) Nor, again, has the objection to the validity of a contract, that it is ultra

(*k*) 1 Lindley, Partnership, 2nd ed., 256, 257; Society of Practical Knowledge v. Abbott, 2 Beav. 559; Bagshaw v. Eastern Union Rail. Co., 19 L. J. 410, Ch.; 7 Ha. 114.

extent of its corporate powers (Dillon on Municipal Corporations, § 381; Hayes v. State Bank, M. & Y. 179; Root v. Goddard, 3 McLean; Pearce v. Madison, &c., Ins. Co., 21 How. 441; Merritt v. Gambert, Hoff. 166; Brady v. Mayor, 2 Bosw. 73; 20 N. Y. 312; Farmers', &c., Trust Co. v. Perry, 3 Sandf. Ch. 339). There are some cases where the defense of ultra vires can not be set up without notice, *e. g.*, the case of negotiable paper. Police Jury v. Britton, 15 Wall. 566; Monument Bank v. Glove Works, 101 Mass. 57; Lexington v. Butler, 14 Wall. 282; Mayor v. Ray, 19 Id. 468; Attorney-General v. Insurance Co., 9 Paige, 470; Bissell v. Michigan, &c., R. R. Co., 22 N. Y. 258; Mechanics', &c., Association v. White Lead Co., 35 Id. 505.

vires, anything to do with the form in which the agreement is made. A contract under seal and made with every formality is nevertheless invalid, if it be a contract beyond the powers of the corporation by or on behalf of which it is made. "Corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by an Act of Parliament for particular purposes with special powers, then, indeed, another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was ultra vires, that is, that the legislature meant that such a deed should not be made." (*l*)

The ultra vires doctrine has been mainly applied to contracts entered into by railway companies. An absolute covenant, for example, by such a company to [280] pay a certain sum of money to a landowner in the event of an act passing, either before taking his land, (*n*) or within three months after the act should pass, (*o*) has been held ultra vires, and therefore not binding on the company; so has been held a contract by a company incorporated for the purpose of making and maintaining a railway, to lease the plaintiff's railway, and to pay the costs of soliciting bills. (*p*)

A distinction must be drawn between contracts which are, strictly speaking, ultra vires, *i. e.*, beyond the powers of a company, and contracts which are within its powers, but irregular, *i. e.*, made in an irregular way. Contracts

(*l*) South Yorkshire Rail. Co. v. Great Northern Rail. Co., 9 Exch. 55, 84; 22 L. J. 305, 313, Ex., per PARKE, B. See Taylor v. Chichester and Midhurst Rail. Co., L. R. 2, Ex. 356; 36 L. J. 201, Ex. (Ex. Ch.), esp. judgment of BLACKBURN, J.; L. R. 2, Ex. 375–389.

(*n*) Gage v. Newmarket Rail. Co., 18 Q. B. 457; 21 L. J. 398, Q. B.

(*o*) Taylor v. Chichester and Midhurst Rail. Co., L. R. 2, Ex. 356; 36 L. J. 201, Ex.

(*p*) East Ang'ian Rail. Co. v. Eastern Counties Rail. Co., 11 C. B. 775; 21 L. J. 23, C. P.

of the former class manifestly do not bind the company, however regularly made. Contracts of the latter class, when made by the directors of a company, though without the prescribed formalities in making them having been observed, bind the company as regards all persons dealing with their directors bonâ fide, and without notice of the irregularity committed in making the contracts. (*r*)[1]

RULE 62.—When a company is in course of winding up, actions against the company can either be stayed, or can not be brought without leave of the Court. (*s*)

Companies can not be made bankrupt. They are wound up under the provisions of the Companies' Act, 1862.

After a petition has been presented to wind up [281] a company, any action against the company may be stayed on the application of the company or any creditor or contributory of the company. (*t*) Application to stay the proceedings may, it seems, be made either to the

(*r*) 1 Lindley, Partnership, 2nd ed., 255, 256.

(*s*) This rule applies, it should be remarked, to incorporated bodies. It does not, however, apply to ordinary corporations, *e. g.*, the corporation of a borough, &c.

(*t*) Companies' Act, 1862, ss. 85, 197; 2 Lindley, Partnership, 2nd ed., 1255.

court in which the action is brought, (*u*) or to the court in which the company is being wound up, *i. e.*, in most cases the court of chancery.

When a company is not formed and registered under the Companies' Act, 1862, it is possible that the creditors of the company may be able to proceed against the individual members. Accordingly, the Act of 1862 contains provisions enabling the court to stay proceedings against individual members, on the application of a creditor of the company. Only a creditor, however, is entitled to stay such proceedings. (*x*)

After the order to wind up a company is made, no action can be brought against the company without the leave of the court. (*y*)

A company may be wound up either by the court, or subject to the supervision of the court, or purely voluntarily. When the winding up is purely voluntary, it does not per se prevent a creditor of the company from bringing an action against it. It is not, therefore, in any case necessary for him to apply for leave to bring an action; but the court (*z*) has jurisdiction to restrain him.

[282] The result, therefore, of the winding up of a company is, either to expose any person who brings an action against it, to have his action stayed, or else (supposing a winding-up order to have been made) to compel him to obtain leave to bring his action.

(*u*) 2 Lindley, Partnership, 2nd ed., 1255; Lanyon v. Smith, 3 B. & S. 938; 32 L. J. 212, Q. B. Compare Thomas v. Wells, 16 C. B., N. S., 508; 33 L. J. 211, C. P.; Gray v. Raper, L. R. 1, C. P. 694.

(*x*) 2 Lindley, Partnership, 2nd ed., 1258; Companies' Act, 1862, ss. 197, 198, 201, 202.

(*y*) Companies' Act, 1862, s. 87; 2 Lindley, Partnership, 2nd ed., 1255.

(*z*) *I. e.*, The Court of Chancery, or the court in which the action is brought. 2 Lindley, Partnership, 2nd ed., 1255.

[1] See ante.

CHAPTER XV.

INFANTS.

RULE 63.—An infant (*a*) can not be sued on any contract made by him.

It being the privilege of an infant not to be bound by his contracts, he can not be sued in an action ex contractu, *e. g.*, for a breach of promise of marriage, for non-delivery of goods, or for the non-performance of the conditions of a bond. Nor is it possible to make an infant liable for what is in reality a breach of contract, by bringing the action in the form of an action for tort, (*b*) but it is said that an infant can be sued for money received, where the real cause of action is a tort, *e. g.*, conversion of goods. "As in the cases of contract, where the law has protected the infant against his liability, he can not be prejudiced by the form of action in which he is sued; so in the cases ex delicto, where he is responsible, (*c*) he can not derive any advantage from it. In Bristow v. Eastman, (*d*) Lord KENYON, C. J., was of opinion that money had and received would lie against the defendant, to recover money which he had embezzled, notwithstanding the infancy of the defendant, on the ground that infants were liable to actions ex delicto, though not ex [284] contractu; and though the action for money had and received was in form an action ex contractu, yet in

(*a*) *I. e.*, a person under twenty-one years of age. An infant has the same right to bring an action as any other person. An infant can sue on a contract (*e. g.*, a promise of marriage) by which he is not bound, and on which, therefore, he can not be sued (Bac. Ab., Infancy, I. 4; Davis v. Mornington, 2 Sid. 109; Holt v. Ward, 2 Str. 937; Warwick v. Bruce, 2 M. & S. 205).

(*b*) See *ante*, and Chapter XXIX.

(*c*) In detinue, for instance. Mills v. Graham, 1 N. R. 140

(*d*) 1 Esp. 172.

this case it was in substance an action ex delicto; that if trover had been brought for the property embezzled, infancy would not have been a defense; and as the object of the action for money had and received was the same, he thought the same rule of law ought to apply, and, therefore, that infancy ought not to be a bar." (*e*)

This view of the law, though approved by good authorities, (*f*) is (it is submitted) open to doubt. A plaintiff who sues for money received chooses, for his own convenience, to treat the cause of action, whatever its real nature, as a breach of contract, and "if the party chooses to bring an action for money had and received, he subjects himself to all the consequences of the defendant's being let in to plead a set-off, infancy, and the like." (*g*) The rule, therefore, appears to be that an infant can not be made liable in an action, either in reality or in form ex contractu.

Exception 1.—Contracts for "necessaries." (*h*)

Though, "strictly speaking, all contracts made by infants are either void or voidable, because the contract is the act of the understanding, which, during their state of infancy, they are presumed to want, yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power, in most cases, to recede from and vacate it, when it may prove prejudicial to them; and where they contract for necessaries they are absolutely bound, and this, likewise, is in benignity to infants, for if they were not allowed to bind themselves for necessaries, no person would trust them, in which case
[285] they would be in worse circumstances than persons of full age.

"Therefore it is clearly agreed by all the books that

(*e*) 1 Selwyn, N. P., 13th ed., 159.

(*f*) Chit., Contracts, 7th ed., 143; Leake, Contracts, 226.

(*g*) Alton v. Midland Rail. Co., 19 C. B., N. S., 241, per WILLES, J.

(*h*) Coke, Litt., 172 a.; Bac. Abr., Infancy, I. 1; Ryder v. Wombwell, L. R. 4, Ex. 38, judgment of Ex. Ch.

speak of this matter, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards." (*i*) But the mere fact that an infant has a sufficient income to obtain the articles he requires with ready money, does not prevent his entering into contracts for necessaries. (*j*)

What are "necessaries?"—The word necessaries, as applied to an infant, extends beyond the sense which is given it in ordinary conversation. It not only includes such articles as are necessary to the support of life, but extends to articles fit to maintain the particular person in the station and degree of life in which he is placed. (*k*)

The term necessaries is, in other words, purely relative to the infant's position in life. For instance, a threepenny ride in an omnibus may be a necessary for a clerk with a salary of £1 a week; a carriage may be a necessary for a person in a different position; an infant, again, orders an expensive coat, but this may be a necessary if it appears that his trade or calling is of that nature that such a coat is necessary for his health, and so forth. (*l*)

From the relative character of the term, combined with the tendency of juries to find an infant, if it be possible, liable on contracts of which he has received the benefit, has arisen a considerable variety in the decisions on the question as to what things are and what are not necessaries. Thus, a livery for the servant of a captain in the army, (*m*) regimentals for the member of a volunteer corps, (*n*) horses for a person in a good [286] position in life, (*o*) have been held necessaries. So, necessaries for an infant's wife have been held necessaries for an infant, (*p*) and an infant widow has been considered

(*i*) Bac. Abr., Infancy, I. 1.
(*j*) Burghart v. Hall, 4 M. & W. 727.
(*k*) Peters v. Fleming, 6 M. & W. 46, judgment of PARKE, B.
(*l*) See Ryder v. Wombwell, L. R. 3, Ex. 90, judgment of BRAMWELL, B.
(*m*) Hands v. Slaney, 8 T. R. 578.
(*n*) Coates v. Wilson, 5 Esp. 152.
(*o*) Hart v. Prater, 1 Jur. 623.
(*p*) Turner v. Trisby, 1 Str. 168; Rainsford v. Fenwick, Carter, 215.

bound by a contract for the expenses of her husband's funeral. (*q*) So, a contract for necessaries for a man's lawful child is a contract for necessaries for himself; and "if a man under the years of twenty-one contract for the nursing of his lawful child, the contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliment and education." (*r*) So the cost of a marriage settlement for a woman under age, who had no property of her own to settle, has been held (*s*) a necessary for her. The foregoing, and other examples which might be given, (*t*) show how wide an extension has been given to the term necessaries, as meaning things suitable to an infant's condition. On the other hand, dinners and desserts have been held not to be necessaries for an undergraduate at college, (*u*) and cigars, (*x*) presents for friends, (*y*) subscriptions to benevolent objects, (*z*) articles of mere ornament, such as diamond studs, (*a*) have been considered not to come within the class of necessaries. An infant, further, can not be charged on a bill of exchange accepted by him, even for necessaries, (*b*) nor on an account stated in respect of a debt due [287] for necessaries, nor can an infant bind himself by executing a cognovit, (*c*) or a bond, (*d*) for a debt due for necessaries. [1]

(*q*) Chapple v. Cooper, 13 M. & W. 252; 13 L. J. 286, Ex.

(*r*) Bacon, Law Maxims, 86; Chapple v. Cooper, 13 M. & W. 259, 260, judgment of ALDERSON, B.

(*s*) Helps v. Clayton, 17 C. B., N. S., 553; 34 L. J. 1, C. P., see esp. 34 L. J. 7, C. P.; judgment of the court.

(*t*) For further examples, see Chit., Contracts, 7th ed., 136–140; Leake, Contracts, 232–234.

(*u*) Brooker v. Scott, 11 M. & W. 67.

(*x*) Bryant v. Richardson, cited in Ryder v. Wombwell, L. R. 3, Ex. 93.

(*y*) Ibid., 90.

(*z*) See Chapple v. Cooper, 13 M. & W. 252; 13 L. J. 286, Ex.

(*a*) Ryder v. Wombwell, L. R. 4, Ex. 32 (Ex. Ch.); 38 L. J. 8, Ex.

(*b*) Williamson v. Watts, 1 Camp. 552.

(*c*) Truman v. Hurst, 1 T. R. 40.

(*d*) Oliver v. Woodroffe, 4 M. & W. 650; but conf. Co., Litt., 172 a; Baylis v. Dinely, 3 M. & S. 477, 482; Marlow v. Pitfield, 1 P. Wm. 558

[1] See next following note.

Two questions with regard to an infant's necessaries have given rise to discussion. (*e*)

First Question.—Can articles be necessaries with which an infant is fully supplied?

Suppose A., a tradesman, to supply X., an infant, with twenty loaves of bread, at a time when X. is already fully supplied with bread; will X. be liable for the price of the twenty loaves as for the price of necessaries? or, to put the same inquiry in another form, can X., when sued by A. for the price of the loaves give evidence that he was already fully supplied with bread?

The answer usually given, and supported by high authority, is, that articles with which an infant is already fully supplied are not necessaries for him; and that, though "an infant may contract a debt for necessaries, notwithstanding he has a sufficient income to supply himself with ready money, (*f*) and the party supplying necessaries to an infant is not, as a general rule, bound to inquire into his circumstances before giving credit to him, (*g*) yet the fact (*h*) of the infant being properly provided with any article is material with regard to the question of the necessity of a further supply of the same article." (*i*)

The correctness of this answer is doubtful. The court of exchequer have held in a recent case (*k*) that evidence could not be tendered to show that an infant was already fully supplied with articles similar to those [288] treated by the plaintiff as necessaries, unless at any rate it could be shown that the fact of the infant being so supplied was within the knowledge of the plaintiff when he supplied the articles; and the court of exchequer chamber have, in the same case, treated the question under discussion as one the answer to which is uncertain. (*l*)

(*e*) Leake, Contracts, 234.
(*f*) Burghart v. Hall, 4 M. & W. 727.
(*g*) Brayshaw v. Eaton, 5 B. N. C. 231.
(*h*) Bainbridge v. Pickering, 2 W. Bl. 1325.
(*i*) Leake, Contracts, 233; Chitty, Contracts, 7th ed., 136, 137, 140. See Ryder v. Wombwell, L. R. 3, Ex. 97, judgment of BRAMWELL, B.
(*k*) Ibid., L. R. 3, Ex. 90; 37 L. J, 48, Ex.
(*l*) Ryder v. Wombwell, L. R. 4 Ex. 42.

"It becomes, therefore," the court say, "unnecessary to decide whether the evidence tendered was properly rejected or not. That is a question of some nicety, and the authorities are by no means uniform. In Bainbridge v. Pickering (*m*) the Court of Common Pleas seem to have acted on a principle which would make the evidence admissible. In Brayshaw v. Eaton, (*n*) BOSANQUET, J., treats it as clearly admissible, and on those authorities the Court of Queen's Bench (then consisting of BLACKBURN, J., and MELLOR, J.) acted in Foster v. Redgrave. (*o*) There is much to be urged in support of the view taken by the majority in the court below, and we desire not to be understood as either overruling or affirming that decision. If ever the point again arises, the court before which it comes must determine it on the balance of authority and on principle without being fettered by a decision of this court." (*p*)

Second Question.—Are there things which can not be necessaries?

It has been maintained, on the one hand, (*q*) though (it is conceived) erroneously, (*r*) that the question whether a given article, *e. g.*, a golden goblet given by a young gentleman to one of his acquaintances, is, or is not, a necessary, is a mere question of fact to be decided with reference to the circumstances of the particular case, and that
[289] there are no articles which may not conceivably fall under the head of necessaries.

It has been maintained, on the other hand, that there are certain things which are so obviously luxuries that they can as a matter of law be pronounced not to be in any case necessaries, or, in other words, that there are articles of mere luxury which can never be necessaries, though luxurious articles of utility sometimes may be so. As examples of mere luxuries have been cited, ear-rings

(*m*) 1 Wm. Bl. 1325.
(*n*) 7 Scott, 183.
(*o*) Cited L. R. 4, Ex. 35 n.
(*p*) Ryder v. Wombwell, L. R. 4, Ex. 42, per CURIAM.
(*q*) Ibid., L. R. 3, Ex. 102. judgment of KELLY, C. B.
(*r*) Ibid., L. R. 4, Ex. 40 (Ex. Ch.).

for a man, spectacles for a blind person, a wild animal, and so forth. (*s*)

A third view, which differs though but slightly, yet materially, from the doctrine that there are some things which can not be necessaries, and which is (it is submitted) correct, is as follows:—There are no articles of which it can be pronounced as a matter of law that they can under no circumstances be necessaries; but while there are some articles (*e. g.*, bread) which, primâ facie, are necessaries, there are other articles (*e. g.*, cigars) which, primâ facie, are not necessaries. When a tradesman sues an infant for the price of the latter, the burden lies upon him of showing affirmatively that articles which are, primâ facie, not necessaries, are made necessaries by the special circumstances of the case. If he does not produce evidence to this effect, and evidence on which a jury may reasonably act, he has not made out his case and the judge should nonsuit him without submitting the case to the jury. (*t*)

The result, therefore, of the law as to an infant's necessaries may be seen from the following examples, in which A. is a tradesman and X. an infant.

A. sells to X. bread, vegetables, &c.; A. can recover from X. the price of the goods on showing that he supplied them to X. on X.'s order, though it is possible that X. may defend himself by proving that he was already fully supplied with bread, &c., and proba- [290] ble that he may do so by showing that A. knew of his being so supplied.

A. sells X. cigars. These are, primâ facie, not necessaries; A. therefore can not recover their price by simply proving the sale to X. If this is all he can prove, he will be nonsuited. But he may produce evidence that the cigars were necessaries for X., *e. g.*, that X. was ordered by his physician to smoke cigars. On the production of such evidence the case will go to the jury, and A. will

(*s*) Ryder v. Wombwell, L. R. 3, Ex. 96, judgment of BRAMWELL, B.

(*t*) See, in support of this view, Ryder v. Wombwell, L. R. 4, Ex. 38–40 udgment of Exchequer Chamber.

recover if they are satisfied that the cigars were, under the whole circumstances of the case, necessaries for X.[1]

[1] See as to necessaries, Breed v. Judd, 1 Gray, 457; Schofield v. White, 29 Vt. 330; Barber v. Vincent, 1 Freeman, 531; Rainwater v. Durham, 2 Nott. & McCord, 524. Schooling and instruction have been held to be necessaries; Tupper v. Caldwell, 12 Metc. 562; Rainsford v. Fenwick, Carter, 216; but not a regular college education; Middlebury College v. Chandler, 16 Vt. 683; generally, Squier v. Hydleff, 9 Mich. 274; Mountain v. Fisher, 22 Wis. 93; Beeler v. Young, 1 Bibb. 519; Abell v. Warren, 4 Vt. 149; Phelps v. Worcester, 11 N. H. 51; Grace v. Hale. 2 Humph. 27; Mason v. Wright, 13 Metc. 306; Stanton v. Wilson, 3 Day, 37; Bent v. Manning, 10 Vt. 225; Rundel v. Keeler, 7 Watts, 239; Phelps v. Worcester, 11 N. H. 51.

The subject of ratification by an infant, and of transactions by them, will be found to be regulated by the statutes of the different states. Thus in Alabama the contracts of an infant are made voidable only. Shropshire v. Barns, 46 Ala. 108. In Iowa a minor is precluded from disaffirming a contract where "the other party had good reason to believe the minor capable of contracting." Beller v. Marchant, 30 Iowa, 350. The provision of the Kentucky Revised Statutes, ch. 22, § 1, that "no action shall be brought to charge any person upon a promise to pay a debt contracted during infancy," does not apply to an action for necessaries furnished the infant. Bonney v. Reardin, 6 Bush. (Ky.) 34. To constitute a binding ratification of an infant's contract, such ratification must be made with the deliberate purpose of assuming a liability from which the person knows himself to be discharged by law. Petty v. Roberts, 7 Bush. (Ky.) 410; and see, generally, Minock v. Shortridge, 21 Mich. 304; Holt v. Baldwin, 46 Mo. 265; Johnston v. Furnier, 69 Pa. St. 449; Grant v. Beard, 50 N. H. 129. As to the disaffirmance of contracts by infants, there is much difference in the rulings of the different states. See, generally, Heath v. West, 6 Foster, 193; Car v. Clough, Id. 280; Roberts v. Wiggin, 1 N. H. 75; Jackson v. Carpenter, 11 Johns. 539; Jackson v. Burchin, 14 Id. 124; Willis v. Twombly, 13 Mass. 204; Knox v. Flack, 10 Harris, 337; Badger v. Phinney, 15 Mass. 359; Hubbard v. Cummings, 1 Greenl. 13; Roof v. Statford, 7 Cow. 183; Wheatley v. Mescal, 5 Ind. 142; Baldwin v. Van Deusen, 37 N. Y. 487; Crymer v. Day, 1 Bailey, 320; Jones v. Todd, 2 J. J. Marsh. 361. But, in cases

Exception 2.—Contracts in respect of permanent property occupied or possessed by an infant.

There seems to be authority for asserting, (*u*) that where an infant becomes possessed by means of a contract of real estate, or other permanent property to which certain obligations (*e. g.*, the payment of rent) are attached, he is liable to these obligations as long as he continues in possession, and until he disagrees to or renounces the estate or repudiates the possession of the property and can be sued in respect of them. Thus where an infant

(*u*) Leake, Contracts, 227, 228.

of an executed contract, the rule is settled that, if it were beneficial to the infant, and entered into bonâ fide, the infant can not rescind unless he can place the opposite party in statu quo. Middleton v. Hoge, 5 Bush. (Ky.) 478; Bryant v. Pottinger, 6 Id. 473; Kerr v. Bell, 42 Mo. 120; Welch v. Welch, 103 Mass. 562; Breed v. Judd, 1 Gray, 457; Heath v. Stevens, 48 N. H. 251; Locke v. Smith, 41 Id. 346; but see Bartlett v. Cowles, 15 Gray, 445; Chandler v. Simmons, 97 Mass. 508; Gibson v. Loper, 6 Gray, 272; Price v. Furman, 27 Vt. 268; Bartlett v. Drake, 100 Mass. 176; Briggs v. McCabe, 27 Ind. 357; Miles v. Lingerman, 24 Id. 385. "The true rule," says Story (Contracts, § 107), "seems to be that when articles are furnished to the infant which do not come within the definition of necessaries, and which are consumed or parted with, or when money is lent which is expended by the infant, that the other party has no remedy to recover an equivalent for the goods or the money, if the specific considerations given by him have been parted with, or be incapable of return. But wherever the specific consideration, whatever it be, exists and remains in the hands of the infant at the time of his disaffirmance of the contract, and is capable of return, the infant is bound to give it up, and he is treated as the trustee of the other party if the contract be made originally in good faith." And so one who has paid off a mortgage on the land of infants can not maintain an action against them for the money, although the mortgage was paid off at the request of their guardian. Bicknell v. Bicknell, 111 Mass. 265. The question as to what are necessaries for an infant is one of fact for the jury. Davis v. Caldwell, Month. L. R. (N. S.) 165.

was admitted to a copyhold estate, and retained possession of it after coming of age, he was held liable for the fines due upon it, and an opinion was expressed by YATES, J., that he would have been liable to an action even during infancy.

"If the defendant was still an infant I should think this action maintainable. Debt perhaps would not lie. . . . But assumpsit, I think, would lie, as the infant continued to occupy and enjoy the estate. In Kirton v. Elliott, (*v*) the plaintiff recovered against an infant the rent upon a lease made to him, and it is there said that if a lease be made to an infant, and he occupies and enjoys, he shall be charged with the rent." (*x*) So, "in-
[291] fants having become shareholders in railway companies, have been held liable to pay calls made whilst they were infants. (*y*) They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt. But, in truth, they are purchasers, who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, . . . and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate,—for instance, to pay rent, (*z*) in the case of a lease rendering rent, and to pay a fine due on the admission, in the case of a copyhold to which an infant has been admitted,—unless they have elected to waive or disagree to the purchase altogether, either during purchase or after full age, at either of which times it is competent for an infant to do so." (*a*)

Father not liable.—A father is, as such, under no legal liability to pay for necessaries supplied to his child.

(*v*) 2 Bulst. 69.

(*x*) Eveiyn v. Chichester, 3 Burr. 1719, judgment of YATES, J.

(*y*) Cork and Bandon Rail. Co. v. Cazenove, 10 Q. B. 935; Leeds and Thirsk Rail Co. v. Fearnley, 4 Exch. 26; 18 L. J. 330, Ex.

(*z*) 21 Hen. VI., 31 B.

(*a*) North-Western Rail. Co. v. McMichael, 5 Exch. 123, 124, per CURIAM.

"In point of law a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother or an uncle or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are not unnaturally disposed to infer against him a liability, in respect of claims upon his son, on grounds which warrant no such inference in law." (*b*) The mere fact that the goods supplied were necessaries, and were supplied with the knowledge of the parent, is not of itself sufficient to support an inference of a promise on the part of the father to pay for them. In order to bind him in point of law for a debt incurred by his child, it must be proved that he has contracted to be bound, just in [292] the same manner as a contract would be proved against any other person. (*c*) A jury, however, will infer that a father has promised on comparatively slight evidence.

RULE 64.—An adult (*i. e.*, a person of or over twenty-one years of age) can not be sued on contracts made by him during infancy.

This rule applies without exception to contracts which the court can pronounce to be to the infant's prejudice, and therefore absolutely void ; (*d*) *e. g.*, a bond conditioned for the payment of interest, (*e*) or a bond with a penalty. (*f*) All the exceptions to it are either contracts on which the infant himself might be sued, or contracts which are not void, but only voidable at the election of the infant on coming of age.[1]

(*b*) Mortimore v. Wright, 6 M. & W. 486, judgment of ABINGER, C. B.

(*c*) Leake, Contracts, 27, 28 ; Mortimore v. Wright, 6 M. & W. 482. Compare Bazeley v. Forder, L. R. 3, Q. B. 559 ; 37 L. J. 237, Q. B.

(*d*) Keane v. Boycott, 2 H. Bl. 511.

(*e*) 8 East, 330.

(*f*) Baylis v. Dineley, 3 M. & S. 477.

[1] See last note.

Exception 1.—Contracts on which an infant might be sued.

An adult can be sued on all the contracts made during infancy (viz., contracts for necessaries) for which he would have been liable while an infant. (*g*) [1]

Exception 2.—Contracts ratified in writing after full age.

An adult may be sued on a contract made during infancy (*e. g.*, for the purchase of goods not necessaries), if, after he comes of age, he confirms it by a new [293] promise or ratification, (*h*) and this promise will be binding without any fresh consideration for it. (*i*) "The principle on which the law allows a party who has attained his age of twenty-one years, to give validity to contracts entered into during his infancy [is] that he is supposed to have acquired the power of deciding for himself whether the transaction in question is one of a meritorious character by which in good conscience he ought to be bound." (*j*)

The promise or ratification must be in writing, and must, under 9 Geo. IV. c. 14, s. 5, be signed by the party himself. (*k*)

It has been held that "any written instrument signed by the party which, in the case of adults, would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority, amount to a ratification;" (*l*) and further, that

(*g*) An adult may be freed from liability for such contracts in consequence of their being barred by the Statutes of Limitations; *e. g.*, if an infant contract for necessaries at the age of twelve, the remedy against him will be barred before he has attained the age of twenty-one.

(*h*) Provided the contract be not originally absolutely void (Baylis v. Dineley, 3 M. & S. 477), in which case it is, strictly speaking, not a contract.

(*i*) As to consideration, see *ante*.

(*j*) Williams v. Moor, 11 M. & W. 256, 264, per CURIAM.

(*k*) 9 Geo. IV., c. 14, s. 5. "The Mercantile Law Amendment Act, 1856" (19 & 20 Vict. c. 97), has not taken away the necessity of the ratification being signed by the party himself. Leake, Contracts, 229.

(*l*) Harris v. Wall, 1 Exch. 122, 130, per CURIAM; Rowe v. Hopwood, L. R. 4, Q. B. 1.

[1] See last note.

the ratification may be made upon a condition, or to a limited extent. Thus if X. promise in a letter, signed by himself, to pay a debt incurred during infancy, when he is able, such new promise is binding upon him conditionally on his becoming able to pay. (*m*)

The confirmation or ratification of a contract made during infancy must in all cases be before action brought. (*n*)[1]

Exception 3.—Contracts connected with the possession of permanent property and not repudiated after full age.

Where an infant not only contracts but also [294] acquires an interest, not in a mere chattel, but in a subject of a permanent nature, (*o*) he is liable to the obligation attached to the contract unless he repudiates the contract within a reasonable time after he comes of age. Thus if a lease be made to an infant during his minority, he ratifies it by remaining in possession after he comes of age, and, on what is really the same principle, if a lease is made by an infant, he ratifies it by accepting rent after he attains his majority; (*p*) and an infant member of a firm who does nothing to disaffirm the partnership upon coming of age, has been held to continue a partner, and to be liable on contracts subsequently made by the firm, (*q*) though not for debts incurred by the firm during his minority. (*r*) Perhaps, however, he may be liable on contracts entered into before he reached the age of twenty-one, but persisted in by the firm after that date. (*s*) An infant shareholder, again, who after he comes of age permits his name to continue registered, thereby ratifies the agreement by

(*m*) See Cole v. Saxby, 3 Esp. 160; and see generally, Leake, Contracts, 229–231.

(*n*) Thornton v. Illingworth, 2 B. & C. 824.

(*o*) London and North-Western Rail. Co. v. McMichael, 20 L. J. 99, Ex.; 5 Exch. 123, judgment of PARKE, B.

(*p*) Baylis v. Dineley, 3 M. & S. 477, 481; 2 Steph. Com., 6th ed., 329.

(*q*) Goode v. Harrison, 5 B. & Ald. 147.

(*r*) Lindley, Partnership, 2nd ed., 86–88.

(*s*) Ibid.

See last note.

which he originally became a shareholder, (*t*) and therefore is liable for calls made as well before as after he came of age. (*u*)

RULE 65.—If one of several co-contractors is an infant, and the others are adults, the adults alone must be sued.

[295] If a joint contract is made by X., an infant, and Y., an adult, an action for the breach of it may and should be brought against Y. only. If an action be brought against them jointly it must fail, for on X. pleading infancy, the plaintiff can not enter a nolle prosequi as to him, and continue the action against Y. (*x*) but must discontinue the action and sue Y. separately. (*y*)

But if Y. alone be sued, and he plead X.'s non-joinder in abatement, the plaintiff may meet the plea by replying X.'s infancy. (*z*)

(*t*) Ibid.

(*u*) London and North-Western Rail. Co. v. McMichael, 5 Exch. 114; 20 L. J. 97, Ex.; Cork and Bandon Rail. Co. v. Cazenove, 10 Q. B. 935; Dublin and Wicklow Rail. Co. v. Black, 22 L. J. 94, Ex.; 8 Exch. 181. (Ex. Ch.) and contrast Newry and Inniskilling Rail. Co. v. Combe, 3 Exch. 565; 18 L J. 325, Ex.

(*x*) Boyle v. Webster, 21 L. J. 202, Q. B.; 17 Q. B. 950.

(*y*) Burgess v. Merrill, 4 Taunt. 468; Chit., Contracts, 7th ed., 143.

(*z*) Chit.. Contracts, 7th ed., 143; Gibbs v. Merrill, 3 Taunt. 307.

CHAPTER XVI.

HUSBAND AND WIFE.

RULE 66.—A wife can not during coverture be sued alone. (*a*)

Exception 1.—Where the husband is civilly dead. (*b*)

Exception 2.—Where the husband is legally presumed to be dead. (*c*)

Exception 3.—Where a wife has a judicial separation or protection order under 20 & 21 Vict. c. 85, ss. 26 and 21. (*d*)

Exception 4.—Where the husband is an alien enemy.

A wife can not, as before pointed out, (*e*) sue alone on the ground that her husband is an alien enemy; but she may at any rate, under some circumstances, be sued alone on the ground that her husband is an alien enemy.

Thus, where the husband is an alien who has deserted this kingdom, leaving his wife to act here as a feme sole, she may, it would seem, be charged in an action against her alone, on contracts made by her after such desertion (*f*) though it is doubtful whether the doctrine that the wife of an alien enemy can be sued alone must [297] not be confined to cases in which the husband has never been in this kingdom. (*g*)

(*a*) See Rule 29 for explanation.

(*b*) See Rule 29, Exception 1.

(*c*) See Rule 29, Exception 2.

(*d*) Ibid., Exception 3.

(*e*) See *ante*.

(*f*) 1 Selwyn, N. P., 13th ed., 240; Walford v. Duchesse de Pienne, 2 Esp. 554; Francks v. Duchesse de Pienne, 2 Esp. N. P. C. 587.

(*g*) But see Kay v. Duchesse de Pienne, 3 Camp. 123, where Lord ELLENBOROUGH confines the doctrine to the case where the husband has never been

SUBORDINATE RULE.

A wife can not be sued by her husband. (*h*)

RULE 67.—A husband and wife must be sued jointly in two cases, *sc.*,

1. On contracts made by the wife before marriage.

2. On contracts on which a claim is made against the wife as executrix or administratrix. (*i*)

The remarks as to the cases in which a husband and wife must sue jointly, (*j*) apply, mutatis mutandis, to the cases in which they must be sued jointly.

A woman does not, in consequence of her marriage, cease to be liable on her contracts made before marriage. She must, however, be sued on them jointly with her husband. It should, however, be remarked that, as regards her liability to be sued, bills of exchange stand on the same footing as other contracts. Hence, though a husband can sue alone on a bill of exchange given to his wife before marriage, he can not be sued alone in respect of a bill on which she has become liable before marriage. It is, further, never the case that an action can be brought at choice either against the husband alone, or against the husband and wife jointly. In other words, there are no cases, as regards actions against hus-

in this kingdom. See 1 Selwyn, N. P., 13th ed., 240. Compare Marsh v. Hutchinson, 2 B. & P. 226; De Gaillon v. L'Aigle, 1 B. & P. 354; Boggett v. Friar, 11 East, 301; Marshall v. Rutton, 8 T. R. 545. But now it is provided by the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93), sect. 12, that "a husband shall not by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts, as if she had continued unmarried." The effect seems to be, that a woman married after the passing of the Act, 9th August, 1870, is liable to be sued for debts contracted before marriage as if she were a feme sole.

(*h*) See *ante*.

(*i*) Compare Rule 30.

(*j*) See *ante*.

band and wife, corresponding to those in which an [298] action may be brought either by the husband alone, or by the husband and wife jointly.

An executrix is liable in that character although married, but she must be sued together with her husband. (*k*)

Effect of death.—The effect of death, as regards actions on contracts made with the wife before marriage, is as follows: (*l*)

If the husband dies before action brought, the right of action, as a general rule, survives against the widow. (*m*) She can not, however, be sued on contracts made with her before marriage if her husband has become bankrupt during her coverture, since the bankruptcy of the husband discharges the wife from liability on her contracts. (*n*)

If the wife dies before action, the right of action survives against her administrator. (*o*)

The same results seem to follow from the death of either party, after action brought, but before judgment recovered. If the wife dies after action brought, the action abates; but the death of the husband is not material, since plaintiff may, on suggesting such death upon the record, proceed in the action against the wife. (*p*)

If the husband dies after judgment recovered, the liability on the judgment remains against the wife. If the wife dies after judgment recovered, the husband [299] remains liable on the judgment as for a debt of his own. (*q*)

(*k*) Bullen, Pleadings, 3rd ed., 156.

(*l*) The general principle to be borne in mind is, that a husband is not liable for his wife's debts contracted before marriage, provided judgment be not recovered for them during coverture; but that he is liable on judgments obtained against him and his wife on account of contracts made by her before marriage. Bacon, Abr., Baron and Feme, F.; Woodman v. Chapman, 1 Camp. 188; 2 Williams, Executors, 6th ed., 1633; Roper, Husband and Wife, 2nd ed., 75.

(*m*) Bullen, Pleadings, 3rd ed., 171.

(*n*) Mitchinson v. Hewson, 7 T. R. 348, 350; Woodman v. Chapman, 1 Camp. 189; Broom, Parties, 2nd ed., s. 223.

(*o*) Bullen, Pleadings, 3rd ed., 171.

(*p*) Lush, Practice, 3rd ed., 102.

(*q*) 2 Roper, Husband and Wife, 2nd ed., 105.

The effect of death as regards actions on contracts on which the wife is charged as executrix, &c., is as follows: on death of the husband the right of action survives against the widow. On death of the wife, the right of action survives against the representative of the testator or intestate.

Effect of divorce.—Divorce releases a husband from liability to be sued jointly with his former wife, on contracts made by her before coverture. (*r*) A husband is (it is conceived) liable, even after divorce, on judgments recovered against himself and his wife.

Set-off.—In an action against a husband and wife for debts due from the wife before marriage, debts due to her before marriage can be set-off, and debts due to her husband can not be set-off. It would seem that debts due to the husband and wife can be set-off.

RULE 68.—In all actions brought to charge a husband on contracts made by his wife during coverture, the husband must be sued alone. (*s*)

A wife can not contract during coverture so as to charge herself. (*t*) She contracts, if at all, as agent of her husband. His liability depends upon the authority of his wife to pledge his credit, which must be proved by the plaintiff. (*u*)

[300] *Authority of wife to bind husband.*—The authority of a wife to pledge her husband's credit depends (with one exception) on the principles which govern the relation of principal and agent. (*x*) The question to be

(*r*) See Capel v. Powell, 34 L. J. 168, C. P.; 17 C. B., N. S., 743. This case refers to torts committed by a wife during coverture; but the principle of it seems to apply to contracts made by her before coverture.

(*s*) Leake, Contracts, 234; Manby v. Scott, 2 Smith, L. C., 6th ed., 396; France v. White, 1 M. & G. 731.

(*t*) Except, of course, in the cases enumerated as exceptions to Rule 65; France v. White, 1 M. & G. 731.

(*u*) Bullen, Pleadings, 3rd ed., 172; Manby v. Scott, 2 Smith, L. C., 6th ed., 396, and following.

(*x*) Chapter XII.

settled is, in all cases, whether the wife has the husband's authority to make the contract on which the action is brought. If she has express authority, or if her husband has ratified (*y*) a contract made by her, no difficulty can exist. Doubt can arise only when the authority relied upon is implied authority. (*z*)

A man's wife, or a woman represented by him to be his wife, is primâ facie presumed to have authority to make contracts such as a wife in her position of life usually makes; *i. e.*, contracts for articles suitable to that station which he permits her to assume. (*a*) The question whether a wife has authority to make a particular contract, *e. g.*, to buy clothes, jewelry, &c., is a question of fact for the jury, and thus, "where a plaintiff seeks to charge a husband on a contract made by his wife, the question is, whether the wife had his authority express or implied to make the contract; . . . if there be express authority, there is no room for doubt; and if the authority is to be implied, the presumptions which may be advanced on one side may be rebutted on the other; and although there is a presumption that a woman living with a man, and represented by him to be his wife, has his authority to bind him by her contracts for articles suitable to that station which he permits her to assume, still the presumption is always liable to be [301] rebutted." (*b*) This authority is so little connected with the relation of husband and wife, that, "if a man allow a woman to live with him, and pass for his wife, he will be liable for necessaries furnished to her even by one who was aware of the real nature of the cohabitation." (*c*)

(*y*) Montague v. Benedict, 3 B. & C. 631; 2 Smith, L. C., 6th ed., 429; Seaton v. Benedict, 5 Bing. 28; 2 Smith, L. C., 6th ed., 13; Waithman v. Wakefield, 1 Camp. 120; Leake, Contracts, 246, 247.

(*z*) See Jolly v. Rees, 33 L. J. 179, C. P., judgment of ERLE, C. J.

(*a*) Manby v. Scott, 2 Smith, L. C., 6th ed., 441; Montague v. Benedict, Ibid., 429; Jolly v. Rees, 33 L. J. 177, C. P.; 15 C. B., N. S., 628; Etherington v. Parrot, 1 Salk. 118; 2 Smith, L. C., 6th ed., 441; Watson v. Threlkeld, 2 Esp. 637.

(*b*) Jolly v. Rees, 33 L. J. 179, C. P., judgment of ERLE, C. J.

(*c*) 2 Smith, L. C., 6th ed., 441

It may be considered an open question, whether the withdrawal of authority by a husband from his wife, without the knowledge of the person dealing with her, frees the husband from liability to such person. According to the latest case on the subject, (*d*) such private withdrawal of authority relieves the husband from responsibility. If such be the law, a private revocation of authority has, it would seem, in the case of a husband and wife, an effect beyond that which it would have in the case of an ordinary principal and agent. (*e*)

Where a wife lives apart from her husband, she has no presumptive authority to bind her husband; but in one case (the exception before referred to) (*f*) she possesses an authority to bind him, which appears to result from the relation of the husband and wife. This case is that of a married woman who, not having an adequate maintenance, (*g*) lives apart from her husband, either with his consent, (*h*) or under compulsion to separate from him on account of his misconduct. Under these circumstances she has an implied authority, which can not be rebutted (or, in other words, a right), to bind her husband by contracts for necessaries, (*i*) unless she is living in adultery. (*k*) A tradesman, or other person, who trusts a wife living apart from her husband, can not treat the husband as liable to pay for goods supplied for her unless the circumstances of the case are such as to give her a right to pledge her husband's credit. The tradesman trusts her at his own risk, and if the circumstances are not such as to give her authority (if, for example, she is living in adultery, or receives an adequate allowance),

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(*d*) Jolly v. Ress, 33 L. J. 177, C. P.; 15 C. B., N. S., 628. Compare Ryan v. Nolan, Irish Rep., 3, C. P. 325, judgment of the court.

(*e*) See judgment of BYLES, J., who dissented from the rest of the court in Jolly v. Rees, 33 L. J. 181, C. P.

(*f*) See *ante*.

(*g*) Ozard v. Darnford, 1 Selwyn, N. P., 13th ed., 229.

(*h*) Mizen v. Pick, 3 M. & W. 481; Biffin v. Bignell, 31 L. J., 189, Ex., 7 H. & N. 877.

(*i*) Bullen, Pleadings, 3d ed., 172, 173.

(*k*) Atkyns v. Pearce, 2 C. B., N. S., 763; 26 L. J. 252, C. P. Cooper v Lloyd, 6 C. B., N. S., 519; Knox v. Bushell, 3 C. B., N. S., 334.

then the husband is not bound, even though the creditor did not know these facts. (*l*)

What are necessaries?—The articles which can be treated as necessaries when supplied to a wife living apart from her husband, must be not only suitable in themselves to her position, but also indispensable, because not supplied from other sources, and indispensable without the fault or waste of the wife. (*m*)

The term has, however, been given a considerable latitude of meaning. "Furniture for a house may be necessary for a wife in a station of life requiring her to live in a furnished house. (*n*) Where it became necessary for a wife to exhibit articles of the peace against her husband, it was held that he was liable for the costs of an attorney employed by her on that occasion, (*o*) and that an allowance made to her for maintenance could not be considered as applicable to that purpose. (*p*) The costs of a proctor (*q*) employed by a wife in prosecuting a suit against her husband for a divorce on the [303] ground of cruelty, may be recovered as a necessary if there was reasonable cause for the suit." (*r*) The legal expenses incurred by a deserted wife preliminary and incidental to a suit for restitution of conjugal rights; (*s*) in obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement; (*t*) in obtaining professional advice as to the mode of dealing with tradespeople who were pressing for payment, and of preventing

(*l*) Biffin v. Bignell, 31 L. J. 189, C. P.; 7 H. & N. 877.

(*m*) Compare the meaning of the word "necessaries" when used with regard to the contracts of an infant, and especially the question whether things can be necessary for an infant with which he is already supplied, *ante*. Ryder v. Wombwell, L. R. 4, Exch. 32 (Ex. Ch.); Jolly v. Rees, 33 L. J. 180, C. P., judgment of BYLES, J.

(*n*) Hunt v. De Blaquiere, 5 Bing. 550.

(*o*) Shepherd v. Mackoul, 3 Camp. 326.

(*p*) Turner v. Rookes, 10 A. & E. 47.

(*q*) Brown v. Ackroyd, 5 E. & B. 819; 25 L. J. 193, Q. B. See Grindell v. Godmond, 5 A. & E. 755.

(*r*) Leake, Contracts, 246.

(*s*) Wilson v. Ford, L. R. 3, Exch. 63.

(*t*) Ibid.

a distress, (*u*) have been all held necessaries for which a wife had authority to pledge the credit of her husband. Where, again, a wife lived separate from her husband for reasons which justified her in doing so, and her child, under seven years of age, was living with her against her husband's will, an order of the Master of the Rolls having been made under 23 Vict. cap. 54, giving the wife the custody of the child, and the wife had no adequate means of support, it was held by the majority of the Queen's Bench, that reasonable expenses for the child were necessaries for the wife, for which she might pledge her husband's credit.[1]

(*u*) Bazeley v. Forder, L. R 3, Q. B. 559; 37 L. J. 237, Q. B.

[1] The law as to necessaries for a wife is one that must vary with the circumstances of each case. So a husband has been held liable for the fees of attorneys employed by her to defend her against a prosecution instituted by her husband to compel her to find sureties to keep the peace. Warner v. Heiden, 28 Wis. 517; but see Ray v. Raden, 50 N. H. 82; Wren v. Hurlburt, 15 Vt. 607; Shelton v. Pendleton, 18 Conn. 417; Coffin v. Dunham, 8 Cush. 404. But a pew in a church has been held not a necessary for a wife so that a husband would be liable for the rent thereof. St. John's Parish v. Bronson, 40 Conn. 75. And see, generally, Johnston v. Allen, 39 How. Pr. 506; Bonney v. Reardin, 6 Bush. 34; McCreedy's Case, 1 Tuck. 374; Mulvey v. State, 43 Ala. 316; Knowles v. Hull, 99 Mass. 562; Day v. Wamsley, 33 Ind. 145; Anderson v. Smith, 33 Md. 465; Woolford v. Burns, 43 Vt. 330; Stevens v. Story, Id. 327; Hultz v. Gibbs, 66 Pa. St. 360; Walker v. Simpson, 7 Watts & S. 83; Franklin v. Foster, 20 Mich. 75; Furlong v. Hysom, 35 Me. 333; Eames v. Sweetzer, 101 Mass. 78; Wood v. O'Kelley, 8 Cush. 406. A son-in-law is liable to his father-in-law for necessaries furnished the former's wife, though there was no implied promise to pay for them. Biddle v. Frazier, 3 Houst. 258. A stepfather, however, is not under any legal obligation to support the children of his wife by a former marriage. Altridge v. Billings, 57 Ill. 489. A husband is liable for necessary medical advice and attendance to the wife, unless the credit was given directly to the wife. Carter v. Howard, 39 Vt. 106. But

Effect of death.—On the death of a husband, his executors become liable on the contracts of his wife made during coverture, on which he himself was liable; thus, generally speaking, the executors of a husband are liable for the debts of his wife contracted after marriage.

From the rule, however, that an agent's authority expires on the death of his principal, it results that if a wife enters into contracts of a character to bind her husband, believing him to be alive, but in reality after his death, neither the wife herself nor the husband's executors, can be made in any way legally liable in respect of such contracts. The widow can not be made liable, because, having originally had, before she knew of her husband's death, full authority to contract, she [304] intended to contract as an agent for him, and did not make herself liable. Nor can she be treated as having fraudulently represented that she had an authority which she had not, or as having impliedly warranted that the authority under which she intended to act actually existed. (*x*) The executors can not be made liable, because the contract was made after the death of the testator. (*y*)

After divorce the husband retains the liability which he had incurred before the divorce on contracts made by his wife during coverture.[1]

(*x*) Smout v. Ilbery, 10 M. & W. 1; 12 L. J. 357, Ex.

(*y*) Blades v. Free, 9 B. & C. 167; 2 Williams, Executors, 6th ed., 1633 Compare 2 Smith, L. C., 6th ed., 456.

dreams and revelations, or visions of a person in a mesmeric sleep, are not necessaries. Id. See Sutler v. Martin, 50 Ga. 242.

[1] The statutes of the different states have regulated the bringing of suits by husband and wife in this country, as instanced by the following decisions: I. WHERE HUSBAND MAY SUE ALONE.—The common-law doctrine that the husband can sue for and recover in his own name the acquisitions of the wife, is substantially recognized by the laws of Georgia; and where a wife purchased cotton with the husband's funds, but added greatly to its value by her skill and management, the husband can maintain an action in the United States court of

RULE 69.—The following are the results of errors in joinder of parties in actions against husband or wife :—

claims in his own name for the proceeds, under the abandoned or captured property act of 1863. Reilly v. United States, 7 Ct. of Cl. 504. Where a husband presented his wife with certain articles of wearing apparel, jewelry, &c., prior to the Illinois statute of 1862, which makes such her sole property—held, that such articles were her paraphernalia, and that a husband could sue alone for an injury to them. McCormick v. Pennsylvania, &c., R. R. Co., 49 N. Y. 303. A husband may maintain an action as holder upon a bill of exchange payable to his wife's order and indorsed by her and others, the last indorsement in this case being in blank. Ahrens v. State Bank, 3 D C. 401. II. WHERE WIFE MAY SUE ALONE.—Under the laws of Georgia, where a wife by consent of her husband makes a contract for her own labor, she herself to receive the compensation. Merewether v. Smith, 44 Ga. 541. And see to the same effect, in New Hampshire; Cooper v. Alger, 51 N. H. 172; unaffected by the fact that the avails of her labor were in the form of a note to her. The New York statute of 1862, ch. 172, does not affect the right of the husband to the earnings of the wife unless she is engaged in some trade or business on her own separate account; and in such a case the husband is the proper plaintiff for an injury to the wife. Filer v. New York, &c., R. R. Co., 49 N. Y. 42. In Illinois, where a wife, during the period when she was living apart from her husband, without fault on her part, received injuries by reason of the neglect of a city to keep a street-crossing in repair, and she, subsequently to obtaining a divorce from her husband by reason of his abandonment of her, in the meantime supported herself by her own industry, held—that she might maintain the action in her own name; Peru v. French, 55 Ill. 317: or where she has been ousted wrongfully from the homestead left in her possession by the husband who has abandoned her; Mix v. King, Id. 434: or, under the Iowa statutes, for a libel; Pancoast v. Burnell, 32 Iowa, 394; or, under the New York statutes, for conversion of, or injury to, her wearing apparel and personal ornaments; Rawson v. Pennsylvania R. R. Co., 48 N. Y. 212. And a wife in New York may sue her husband for partition; Moore v. Moore, 47 N. Y. 467; or her husband's firm, including himself, for services rendered the firm;

1. If a husband is sued alone where his wife must be joined, the error is fatal.[1]

2. If a wife is sued alone, where she must be joined, the only result is to expose the plaintiff to a plea in abatement.

3. If a husband is sued jointly with his wife where he ought to be sued alone, the error is fatal unless amended.

1. *If a husband is sued alone, &c.*—If a husband is sued alone where his wife ought to be joined, *e. g.*, on contracts made with his wife before marriage, (*z*) the error is fatal; for if it appears on the record, it gives rise to a demurrer, &c.; and if it appears on the trial, it gives rise to a nonsuit or adverse verdict. The defendant may plead the general issue, *e. g.*, never in- [305] debted, and the error can not be amended at the trial by adding the name of the wife. (*a*)

(*z*) Rule 69.

(*a*) Garrard v. Giubilei, 11 C. B., N. S., 616; 31 L. J. 131, C. P., esp. judgment of WILLIAMS, J., 31 L. J. 133, C. P.; 13 C. B., N. S., 832; 31 L. J. 270 C. P. (Ex. Ch.).

Adams v. Curtis, 4 Lans. 164; and also in Tennessee, where they were married *after* the services were rendered; Bennett v. Winfield, 4 Heisk. 440. A married woman domiciled in another state than that where the suit is brought, is governed by the laws of the state of her domicil, and may bring an action in her own name if permitted to do so by its statutes. Stoneman v. Erie Ry. Co., 52 N. Y. 429. III. WHERE BOTH MAY SUE.—A married woman, a tenant for years, may, in Ohio, jointly with her husband, sue a lessor for specific performance or compel a conveyance; Bain v. Bickett, 1 Cinc. 161; and a husband in that state, after his wife's death, may join with her heirs in a petition in error to reverse a judgment rendered against himself and wife; Hammond v. Hammond, 21 Ohio St. 620.

[1] In Texas both the husband and wife must sue for recovery of community property. Murphy v. Coffey, 33 Tex. 508. See a valuable note as to the wife's separate property rights, in note 1 to p. 261, vol. 1, of Morgan's Addison on Contracts Page v. DeLeuw, 58 Ill. 85; Cooper v. Alger, 51 N. H. 172

2. *If a wife is sued alone, &c.*—If a wife is sued alone, *e. g.*, on contracts made by her before marriage, a formal error has been committed; for she ought never to be sued without her husband. Still, the person sued is in reality liable. She, therefore, can not treat the error as affording an answer to the action, but she may insist upon her husband being joined as defendant. In other words, she may plead her coverture in abatement. She can take no other advantage of the error. (*b*) [1]

3. *If a husband is sued jointly, &c.*—If a husband and wife are sued jointly where the husband ought to be sued alone, the error is fatal, unless amended. (*c*) It may, perhaps, be a question whether this error can be amended. It resembles rather the case of an action against a wrong defendant than that of a simple misjoinder of defendants. (*d*)

(*b*) Bullen, Pleadings, 3rd ed., 171; Lovel v. Walker, 9 M. & W. 299; Milner v. Milnes, 3 T. R. 627, 631.

(*c*) See Chapter XXXIV.

(*d*) If a wife be sued alone in cases where she ought not to be joined, she is, in effect, sued on a contract on which she is not liable. An action, therefore, against her can not succeed. If, however, the defense is that she is not liable, because at the time of making the contract she was a married woman, her coverture must be specially pleaded. Bullen, Pleadings, 3rd ed., 598; 7 R. G. d. T. 53.

[1] When the husband acts as the wife's agent she must be sued alone; Ingrim v. Nedd, 44 Vt. 462; in Kansas, where she has executed a note in payment of her husband's debt; Deering v. Boyle, 8 Kan. 525; or in Missouri, where she possesses a separate estate; Lackland v. Mittalberger, 50 Mo. 182; and see Kennard v. Lax, 3 Oreg. 263. Both as to where husband and wife may be joined, see Smotridge v. Lovell, 35 Tex. 58; Davidson v. McCandlish, 69 Pa. St. 169; Kowing v. Manly, 49 N. Y. 172; Lennox v. Eldridge, 65 Barb. 510; Briggs v. Davis, 108 Mass. 322; Bacon v. Beavan, 44 Miss. 293; Carleton v. Haywood, 49 N. H. 314.

CHAPTER XVII.

BANKRUPT AND TRUSTEE.

RULE 70.—A bankrupt can not after his discharge be sued on contracts made before bankruptcy. (*a*)[1]

Bankruptcy does not of itself (*b*) free the bankrupt from liability on his contracts. (*c*)

The following contracts with the bankrupt are put an end to altogether as far as he is concerned, by and from the date of the order of adjudication.

1st. *Covenants or other contracts having relation to onerous property, which the trustee may either adopt or disclaim.*—Whether the rights and obligations under such covenants or contracts are adopted or disclaimed by the trustee, the rights and obligations of the bankrupt cease from the time of his being adjudicated a bankrupt. If, for instance, the bankrupt has a lease of property under which he is bound to repair, the trustee may adopt the lease, in which case all liability for future breaches of the covenant to repair, passes away from the [307]

(*a*) Bankruptcy Act, 1869, ss. 23, 33, 31, and 49. Debts or liabilities contracted after the date of the order of adjudication are not proveable under the bankruptcy, or barred by the order of discharge. Bankruptcy Act, 1869, ss. 31, 49.

(*b*) Spencer v. Demett, L. R. 1, Ex. 123; Hartley v. Greenwood, 5 B. & Ald. 95; Jones v. Hill, L. R. 5, Q. B. 230. See Bankruptcy Act, 1869, s. 49, by which the discharge must be pleaded.

(*c*) A bankrupt sued at any time after the presentation of a bankruptcy petition should apply to the court having jurisdiction in bankruptcy to restrain further proceedings; and this he may do after the presentation of the petition in respect of an action in progress at the commencement of the bankruptcy. The court has discretion whether to stay such actions or not. Bankruptcy Act, 1869, ss. 13, 4.

[1] Thornburg v. Madren, 33 Iowa, 380; Apperson v. Stewart, 27 Ark. 619; Dusenbury v. Hoyt, 14 Abb. Pr., N. S., 132.

bankrupt; or the trustee may disclaim any interest in the property, in which case also the bankrupt ceases, from the date of the adjudication, to have any interest in the property or to be liable in any way for future breaches of the covenants. (*d*)

2nd. *Indentures of apprenticeship.*—An indenture of apprenticeship is completely discharged, at the will either of the bankrupt or the apprentice, by the order of adjudication. (*e*)

The general principle as to all other liabilities on contracts made by the bankrupt before bankruptcy, is that if the claims against him are proveable, the order of discharge (*f*) (not the bankruptcy) frees him from liability for them. The tendency of successive Bankruptcy Acts has been so to extend the number of claims which are made proveable, that it may now be laid down that (subject to some few exceptions hereafter enumerated) all claims against a bankrupt arising on contracts or promises made by him before bankruptcy are proveable against his estate, and are, therefore, barred by his discharge. (*g*)

(*d*) Bankruptcy Act, 1869, s. 23. As regards breaches committed before the adjudication, the bankrupt's liability is exactly the same as for the breach of any other contract made by him before bankruptcy.

(*e*) Bankruptcy Act, 1869, s. 33.

(*f*) Ibid., s. 49.

(*g*) This is the result of the following provisions of the Bankruptcy Act, 1869, s. 31:—

"Demands, in the nature of unliquidated damages, arising otherwise than by reason of a contract or promise [*i. e.*, demands arising from torts], shall not be proveable in bankruptcy; and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.

"Save, as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy, by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts proveable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy.

. . . . . .

"'Liability' shall, for the purposes of this Act, include any compensation for work or labor done; any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not

There are some debts or liabilities which are not got rid of by the order of discharge, and which, [308] therefore, constitute the exceptions to the general rule under consideration.

Exception 1.—Debts or liabilities held not to be proveable by the Court of Bankruptcy.

"Any person aggrieved by any estimate made by the trustee may appeal to the court having jurisdiction in bankruptcy, and the court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such an order being made, such debt or liability shall for the purposes of this Act, be deemed to be a debt not proveable in bankruptcy." (*h*)

Exception 2.—Debts or liabilities contracted after notice to the creditor of an act of bankruptcy. (*i*) [1]

Exception 3.—Debts or liabilities incurred by means of fraud or breach of trust. (*k*) [2]

occur, or is or is not likely to occur, or capable of occurring, before the close of the bankruptcy; and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money, or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as a matter of opinion."

(*h*) Bankruptcy Act, 1869, s. 31. Compare, as to the meaning, under the Bankruptcy Act, of "debt and liability," sect. 31 and s. 4.

A number of claims were held not proveable under former Acts, mainly on the ground that their value could not be estimated. It is possible that many claims decided not to be proveable under the former Acts, may be held to be, as a matter of fact, incapable of proof under the present Act.

(*i*) Ibid., s. 31.

(*k*) Ibid., s. 49.

[1] A discharge in bankruptcy operates only against such claims as are provable before the last dividend. Gibson v. Green, 45 Miss. 209.

[2] Symonds v. Barnes, 59 Me. 191. An auctioneer who has failed to pay over to a city moneys of the city received by him, is not released, nor are his sureties released, by a discharge in

[309] *Exception* 4.—Debts or liabilities whereof the bankrupt has obtained forbearance by fraud. (*l*) [1]

Exception 5.—Debts due to the Crown. (*m*)

Exception 6.—Debts with which the bankrupt stands charged for an offense against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond, entered into for the appearance of any person prosecuted for any such offense. (*n*)

RULE 71.—An undischarged bankrupt remains liable on contracts made by him before bankruptcy.

The mere bankruptcy not being itself a discharge from liabilities, an undischarged bankrupt is obviously up to the close of the bankruptcy still liable on his contracts, though, as already explained, (*o*) he may apply to the court to stay an action against him.[2]

(*l*) Bankruptcy Act, 1869, s. 49.
(*m*) Ibid.
(*n*) Ibid. He may, however, be discharged from the last two classes of debts by the consent of the Commissioners of the Treasury.
(*o*) See *ante*.

bankruptcy; Jones v. Russell, 44 Ga. 460; McMinn v. Allen, 67 N. C. 131; Cronan v. Cotting, 104 Mass. 245; nor damages for a seduction, Nassau v. Parker, 1 Pa. Law Journ. Rep. 317; and see Donnell v. Swain, 2 Id. 134; Kingsley v. Prentiss, 3 Id. 71. So money collected by an attorney for his client, and wrongfully retained by him, is not a debt which would be discharged. Heffren v. Jayne, 39 Ind. 46. But a judgment obtained for a tort may be discharged. See Manning v. Keyes, 9 R. I. 224; Re Wiggers, 2 Biss. 71.

[1] But a judgment upon a contract induced by fraud is not a debt "created" by fraud within the meaning of the bankrupt act. The recovery of such judgment is a waiver of the fraud, and a discharge in bankruptcy is a defense thereto. Palmer v. Preston, 45 Vt. 154; Shuman v. Strauss, 34 N. Y. Superior Ct. 6.

[2] See Davis's Case, 1 Sawyer, 260; Payson v. Dietz, 2 Dill. 504; Re Sacchi, 10 Blatchf. 29; Re Campbell, 3 Pittsb. 96;

But a bankruptcy may be closed, and yet under the present Act the bankrupt may not obtain his discharge, and thus may, even after the proceedings in bankruptcy are ended, remain an undischarged bankrupt. (*p*)

The result of the Act seems to be, that during [310] three years after the close of the bankruptcy, no claim depending on a contract made before the adjudication of bankruptcy can be enforced against the property of the bankrupt; but it would rather appear that there is nothing to prevent a creditor from bringing an action against the bankrupt in respect of such claim during the three years. (*q*)

(*p*) His position, which is peculiar, is thus defined by the act:—

"Where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of the bankruptcy, the following consequences shall ensue:—

"1. No portion of a debt proveable under the bankruptcy, shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy, and during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his property during the bankruptcy, make up ten shillings in the pound, he shall be entitled to an order of discharge, in the same manner as if a dividend of ten shillings in the pound had originally been paid out of his property.

"2. At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the meantime), shall be deemed to be a subsisting debt, in the nature of a judgment debt, and, subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor with the sanction of the court which adjudicated such debtor a bankrupt, or of the court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in manner directed by such court, and after giving such notice and doing such acts as may be prescribed in that behalf." Bankruptcy Act, 1869, s. 54. The expression debt proveable under the bankruptcy, includes, speaking generally, all liabilities arising out of any contract made before the adjudication of bankruptcy. See Chapter XVII.

(*q*) See, however, Bankruptcy Act, 1869, s. 12, compared with sect. 54.

Re Atkinson, Id. 424; *Re* Mallory, 1 Sawyer, 88; Mainwaring v. Kouns, 35 Tex. 171; and as to the effect of bankruptcy proceedings on pending suits, see Smith v. Soldier's, &c., Co., 35 N. J. L. 60; Stone v. Brookville Bank, 39 Ind. 284; Stuart v. Hines, 33 Iowa, 61; Foster v. Wylie, 60 Me. 107; Fritsch v. Van Mitendorf, 2 Cin. 261; Cannon v. Wallford, 22 Gratt 195.

After the lapse of the three years, any unpaid balance of debt proved under the bankruptcy becomes, in case the debtor has not obtained an order of discharge, a judgment debt, and payment can, it is presumed, be enforced either by execution or by an action on the judgment.

RULE 72.—The trustee can be sued as a trustee on contracts entered into by him in his character as a trustee.

The rule under the old Bankruptcy Acts was, that the assignees of a bankrupt could not be sued as assignees at law. They did not (nor does the trustee) represent the bankrupt as regarding his liabilities. In other words, they could not be sued on contracts made by the bankrupt in the same way in which an executor can be
[311] sued on the contracts of his testator, since the mode in which a creditor of a bankrupt must enforce his claim is not by action against the assignees or trustee, but by proof against the estate.

The assignees, on the other hand, if they themselves entered into contracts, were personally liable, if at all. (*r*) If, for instance, as they had power to do, they adopted contracts entered into by the bankrupt, they personally took the liabilities of the contracts, (*s*) and thus, on adopting a lease made to the bankrupt, incurred the same liabilities as any other assignees, and could get rid of them in the same way as other assignees, by assigning over the lease. (*t*)

The position of the trustee under the present Act is apparently different. He, like the assignees, is in no sense liable, and can not be sued for the breaches of contract of the bankrupt; but he can enter into engagements in his character as a trustee, and such engagements will

(*r*) Ridout v. Brough, Cowp. 134; Broom, Parties, 2nd ed., s. 183.
(*s*) Gibson v. Carruthers, 8 M. & W. 321.
(*t*) Onslow v. Corrie, 2 Madd. 330; Broom, Parties, 2nd ed., s. 230.

bind succeeding trustees. This, at least, seems to be the effect of the following enactment:—(*u*)

"The trustee of a bankrupt may sue and be sued by the official name of 'the trustee of the property of——, a bankrupt,' inserting the name of the bankrupt, and by that name may hold property of every description, make contracts, sue and be sued, enter into any engagements binding upon himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office."

It may be inferred from this, that if a trustee adopts a contract made with the bankrupt,—*e. g.*, a lease, he and his successors become liable upon it as trustees.

The trustee can, when the bankruptcy is closed, apply to the Court for a release; (*x*) and, the order of release, if granted, discharges him "from all liability [312] in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee of such bankrupt; but such order may be revoked by the Court on proof that it was obtained by fraud."[1]

(*u*) Bankruptcy Act, 1869, s. 83, cl. 7.
(*x*) See Bankruptcy Act, 1869, ss. 51–53.

[1] See as to actions by and against assignees in bankruptcy, *Ex parte* Rockford, &c., R. R. Co., 1 Low, 345; *Ex parte* Dalby, Id. 431; *Ex parte* Ames, Id. 561; Miller v. O'Brien, 9 Blatchf. 270; Knowlton v. Moseley, 105 Mass. 136; Rogers v. Stephenson, 16 Minn. 68; Sedgwick v. Casey, 4 Ben. 562; Wright v. Johnson, 8 Blatchf. 150; Reade v. Waterhouse, 12 Abb. Pr., N. S., 255; Bromley v. Smith, 2 Biss. 511; Traders' Bank v. Campbell, 14 Wall. 87; Smith v. Mason, Id. 419; Barron v. Newberry, 1 Biss. 149; Cole v. Duncan, 58 Ill. 176; Bradshaw v. Cline, 2 Biss. 20; Cragin v. Carmichael, 2 Dill. 519; against an assignee, Cragin v. Thompson, 2 Id. 513; Adams v. Meyers, 1 Sawyer, 306; Hallam v. Maxwell, 2 Cin. 136; Holl v. Deshler, 71 Pa. St. 299.

CHAPTER XVIII.

EXECUTORS, ADMINISTRATORS, AND HEIRS.

RULE 73.—The personal representatives (*a*) of a deceased person (*i. e.*, his executors or administrators) (*b*) can be sued on all contracts made with him whether broken before or after his death.

Executors or administrators represent the deceased, or rather, his personal estate, and are liable, to the extent of the assets which have come into their hands to be administered, upon all contracts made by him for breaches before or after his death. (*c*) Their liability is the same, whatever the form (*d*) or the nature of the testator's or intestate's contracts; that is to say, an executor, &c., is bound, not only by the promise of the testator to pay a debt, but by his undertaking to perform any other act,—*e. g.*, to give a fortune to his daughter, (*e*) to build a house, (*f*) and so forth. So, if M., the testator, enters into a contract with A., that N. should serve A. for a certain time, and after M.'s death, N., before the expiration of the time, leaves A.'s service, A. can sue X., M.'s execu-
[314] tor, for the breach of the agreement. (*g*) So, where A. had entered into a contract with M. to supply him with a certain quantity of slate monthly at a fixed price, and M. agreed to receive a certain number of tons

(*a*) See, for distinction between real and personal representatives, Chapter XVII.

(*b*) The liability of an executor is, except where the contrary is stated, the same as that of an administrator, and vice versa.

(*c*) Bullen, Pleadings, 3rd ed., 154.

(*d*) 2 Williams, Executors, 6th ed., 1590–1592.

(*e*) Bacon, Abr., Executors, P. 2; 2 Williams, Executors, 6th ed., 1591.

(*f*) Quick v. Ludborrow, 3 Bulst. 30; Wentworth v. Cock, 10 A. & E. 42.

(*g*) Williams Executors, 6th ed., 1592.

until a date fixed upon in the agreement, and died before that date, it was held that X., his personal representative, who refused to receive the slate, was liable to an action at the suit of A., on the ground that he was bound to pay damages out of the assets if he did not take the contract upon himself. (*h*)

Though an executor is at common law (*i*) not liable for the torts of his testator, he can often be sued for what is in reality a tort in the form of an action for breach of contract. At common law, for example, trover does not lie against an executor for a conversion by his testator: but if the testator converts and sells goods of another person, the owner can bring against the executor an action for money received. So, if one man take the horse of another, and bring him back again, his executor can not (independently of statute) be sued for the trespass, though the wrong-doer might have been so sued; but an action can be brought against the executor for the use and hire of the horse; and though the executor of an innkeeper can not be sued in tort (unless under 3 & 4 Will. IV. c. 42, s. 2) for the loss of a guest's goods, he can be sued for the breach of an implied promise to keep them safely. (*l*)

(*h*) Wentworth v. Cock, 10 A. & E. 42.

(*i*) He is now, generally speaking, liable by statute. See Chapter XXXII. *post.*

(*l*) Morgan v. Rarey, 2 Fost. & F. 283. See, for these and further examples, Williams, Executors, 6th ed., 1598, 1602. It should be noticed that in the last case, as in the similar one of an action against a carrier for breach of the contract to carry safely, the real ground of the action is a breach of contract, and not a tort.

It is not quite clear how far an executor can be made responsible for an act which is not really a breach of contract, by being sued in the form of an action ex contractu. He can not, for example, be sued for a debt due on a penal statute (2 Williams, Executors, 6th ed., 1597; Anon., Dyer, 271 a.); and it is questionable to what extent the executor can be made liable in an action ex contractu for the negligence of his testator; *e. g.*, as a carrier, surgeon, &c. His liability probably depends upon the answer to the inquiry, whether such actions are to be considered as in substance actions for breach of contract or actions for tort (compare Powell v. Layton, 2 N. R. 370; Alton v. Midland Rail. Co., 19 C. B., N. S. 213; 34 L. J. 292, C. P.; Pozzi v. Shipman, 8 A. & E. 963). But it seems, on the whole, that an executor—at any rate of a carrier—can be made liable in an action on contract for his negligence. Chapter XIX.

[315] An executor may further be liable to an action where the testator could not have been sued; *e. g.*, where he has contracted that his executors shall pay £20 after his death. (*m*)

The personal representatives are bound by all contracts made by the deceased, whether named therein or not, and even when the heir is named and they are not named, (*n*) and their liability is not diminished by the fact that the real representatives may be also liable. (*o*) Hence, an executor may be sued on a covenant real, *i. e.*, one which runs with the land, and descends to the heir. (*p*) His liability, therefore, exceeds his rights, in respect of such covenants, (*q*) for an executor can not sue on them, even though broken in the testator's lifetime, unless substantial damage was caused by the breach to the personal estate.

Exception 1.—Contracts limited to the lifetime of the deceased. (*r*)

Exception 2.—Covenants in law not broken during the lifetime of the deceased.

Certain covenants are annexed by the law to the use of certain expressions. Whenever, for example, certain terms are used in a lease, it is inferred, as a matter of law, that the person using them enters into certain covenants.

Thus, under a lease by deed, the word demise or [316] let, or any equivalent words sufficient to constitute a lease, import a covenant for title and for quiet enjoyment, unless there be an express covenant on either point, in which case no implication can be raised from such words. (*s*) Such implied contracts are limited to the

(*m*) Powell v. Graham, 7 Taunt. 580.

(*n*) Bacon, Abr. Heir, F.; Williams, Executors, 6th ed., 1591, 1592.

(*o*) Ibid., 1616, 1617.

(*p*) Ibid.

(*q*) See *ante*.

(*r*) Rule 41, Exception 2. It would appear that an executor can not be sued for a breach of promise of marriage by his testator. See Chamberlain v Williamson, 2 M. & S. 408.

(*s*) Line v. Stephenson, 4 Bing. N. C. 678; 5 Bing. N. C. 183; Adams v. Gibney, 6 Bing. 656, 666.

duration of the lessor's estate, and cease (*t*) upon its determination. (*u*) No action lies against an executor or administrator upon such a covenant at law which is not broken until after the death of the testator. (*v*) Accordingly, where a tenant for life remainder over, demised to the lessee, his executors, &c., for a term of fifteen years, without any express covenant for quiet enjoyment, and the lessee was evicted by the remainderman after the death of the tenant for life, but before the expiration of the fifteen years, it was held that no action of covenant could be maintained by the lessee against the executor of the tenant for life in respect of such eviction, although it was admitted that the use of the word demise in the lease imported a covenant in law for quiet enjoyment. (*w*)

Exception 3.—Contracts on which the deceased must have been sued jointly with other persons. (*x*)

SUBORDINATE RULE I.

An action can be commenced against an executor before probate, but an action can not be commenced against an administrator before letters of administration granted to him. [317]

A person who in any way acts as executor, without taking out probate, and, indeed, without any claim to be executor, incurs the liabilities attaching to the position of executor, and, therefore, against such a person who is an executor by his own wrong, or, as he is called, an executor de son tort, an action can be, not only commenced, but also maintained, even though he never prove the will or take out letters of administration. (*y*)

(*t*) Line v. Stephenson, 4 Bing. N. C. 678; 5 Bing. N. C. 183; Adams v. Gibney, 6 Bing. 656, 666; see Williams v. Burrell, 1 C. B. 402; Penfold v. Abbott, 32 L. J. 67, Q. B.

(*u*) Bullen, Pleadings, 3rd ed., 205, n.

(*v*) 2 Williams, Executors, 6th ed., 1618.

(*w*) Ibid.; Adams v. Gibney, 6 Bing. 656. Compare, as to difference between covenants in law and implied covenants, William v. Burrell, 1 C. B. 402; 14 L. J. 98, C. P.; Smith, Landlord and Tenant, 293, n. 19.

(*x*) Compare Rule 41, Exception 4; and see Rule 52 for explanation.

(*y*) 1 Williams, Executors, 6th ed., 247–262.

SUBORDINATE RULE II.

On the death of a defendant the action may be carried on against his executor or administrator.

If the cause of action against the deceased is one which survives against his representatives, an action commenced against him does not on his death abate, but may be carried on against his representatives.

RULE 74.—An executor or administrator must be sued in his representative character; *i. e.*, as executor or administrator, on all contracts made by the deceased.

An executor is responsible for the contracts of the testator, simply because he is executor, and only in so far as he has assets. He must, therefore, be sued as executor on all contracts made by the deceased. The same principle applies where the ground of the executor's liability is not a contract of the testator's, but some act of his which gives rise to a so-called implied contract; and this holds good even where the breach of the implied contract did not take place until after testator's death. [318] Where, for example, M. and A. are co-sureties, and after M.'s death A. is compelled to pay the whole debt, A. certainly may, and apparently must, sue X.. the representative of M., in X.'s representative character, *i. e.*, as executor or administrator. (*a*)

RULE 75.—An executor or administrator must be sued in his personal character on contracts made by himself.[1]

(*a*) 2 Williams, Executors, 6th ed., 1637, 1638. Compare Corner v. Shew 3 M. & W. 350, 353.

[1] Where executors continue to carry on the business of their testator, the money recovered by them on contracts

An executor is personally liable on contracts made by himself, even though they have reference to, and are for the benefit of, the testator's estate. (*b*) Thus an executor,

(*b*) Ibid.

effected in carrying on the business will be assets in their hands, and they may therefore sue for it in their representative capacity, and it makes no difference that the materials supplied under the contract never belonged to the testator. They may also maintain an action, in their representative character, upon all negotiable securities which have been indorsed or made payable to them as executors or administrators, or generally or individually, if the amount when recovered will be assets in their hands. If, by mistake, they pay away the money, or if they sell the goods, of their testator, or carry on his business for the benefit of his personal estate, and for the purpose of winding up his affairs, and enter into contracts in so doing, they may sue either in their representative capacity, or in their individual character, not naming themselves executors. They should, however, upon such contracts, sue in their representative capacity, in order to protect the assets from a set-off in respect of their individual debts. The title of an administrator to the effects and personal estate of the deceased, though it does not exist until the grant of administration, relates back to the time of the death, so as to entitle the administrator to sue upon an implied contract of sale in respect of goods delivered to and received by a party before the grant of the letters of administration. And if an agent sells goods in ignorance of the death of the principal, the administrator may adopt the contract, and sue upon it in his representative character as soon as he has obtained letters of administration. See Vaughan v. Stephenson, 69 N. C. 212; Farnham v. Mallory, 2 Abb. (N. Y.) App. Dec. 100; Smith v. Britton, 45 How. (N. Y.) Pr. 428; Beall v. New Mexico, 16 Wall. 535; Dunlop v. Newman, 47 Ala. 429; Neal v. Patten, 47 Ga. 73; Burnham v. Lasselle, 35 Ind. 425; Smith v. Dodds, 35 Id. 452; Stone v. Bancroft, 108 Mass. 98; Forist v. Androscoggin Co., 32 N. H. 477; Evans v. Evans, 23 N. J. Eq. 71; Cool v. Higgins, Id. 308; Davis v. Fox, 69 N. C. 435; Parrish v. Brooks, 4 Brews. (Pa.) 154; Bouslough v. Bouslough, 68 Pa. St. 495; Brown v. Lewis, 9 R. I. 497; Thompson v. Branch, 35 Tex. 21; Dunnel v. Municipal Court, 9 R. I. 189; Stanley v. Mason, 59 N. C. 1; Russell Umphlet, 27 Ark. 339; Sanford v. McCreedy, 28 Wis. 103;

though not personally liable for the contracts of the deceased, may make himself liable for them by a new contract, which, under the Statute of Frauds, must be in writing, and which, unless it be by deed, is of no force without a consideration. (*c*) An executor or administrator, again, who carries on the testator's trade, is personally liable on contracts made in respect of such trade, and is so liable on an implied contract to pay for the suitable funeral expenses of the deceased. (*d*) As, however, an executor's liability in this case depends on his having assets, he may defeat an action founded only on the implied contract, by showing that he has no assets. (*e*)

The following are some of the distinctions between an action against an executor in his representative character and an action against him in his personal character.

[319] The judgment against an executor, when liable only as such, is a judgment de bonis testatoris, or against his testator's goods. The judgment against an executor, when liable personally, is a judgment de bonis propriis, or against his own goods. (*f*) An executor, sued as such, can raise defenses, *e. g.*, that he has fully administered the estate of the testator, which, from their nature, are available for an executor or an administrator only, whilst, on the other hand, he can not raise a defense, such as his own bankruptcy, which might be available in an action against him personally. (*g*) The difference between the two kinds of actions is further seen in the rules as to—

Set-off.—In in action against an executor for debts

(*c*) 2 Williams, Executors, 6th ed., 1640, 1648, 1654. See, as to consideration, *ante*.

(*d*) Brice v. Wilson, 8 A. & E. 349.

(*e*) Under the plea of never indebted, viz., Tugwell v. Heyman, 3 Camp. 298; Rogers v. Price, 3 Y. & J. 28; Bullen, Pleadings, 3rd ed., 161.

(*f*) 2 Williams, Executors, 6th ed., 1823, 1824.

(*g*) 1 Ibid., 603; 2 Ibid., 1793.

Wilson v. Barclay, 22 Gratt. 534; Staggs v. Ferguson, 4 Heisk. 670; Flood v. Pilgrim, 3 Wis. 376; McGonigal v. Calter, Id. 614.

due from the testator, debts due to the testator (*h*) may be set-off, but not debts due to the executor as executor. (*i*)

In an action against an executor on promises made by him as executor—*e. g.*, on an account stated by him as executor in respect of debts due from the testator,—it is possible that a debt due from the plaintiff to the testator may be set-off, since the account stated by the executor as such shows a debt due from his testator to the plaintiff; (*j*) but it would seem that in an action against an executor for debts due from him as executor, debts due to the testator can not be set-off.

In an action against an executor, in his personal capacity, debts due to him personally may be set-off, but not debts due to the testator, or to him as executor. (*k*)
An executor, sued as such, can not set-off a debt [320] due to him personally. (*l*)

Lessor or lessee.—An executor's liabilities under a lease are peculiar, as he may be liable both as executor and as assignee.

As executor he is, as before pointed out, liable for all the promises of the deceased, and therefore, "although a covenant in a lease should be of a nature to run with the land, (*m*) so as to make the assignee of the term liable for a breach of it after assignment, yet this shall not discharge the lessee from a concurrent liability on the covenant as far as he has assets, even although the lessor may have accepted the assignee as his tenant. (*n*) Therefore, where the lessee has assigned the term in his life-

(*h*) 2 Geo. II. c. 22, s. 13.

(*i*) Mardall v. Thellusson, 6 E. & B. 976 (Ex. Ch.), reversing judgment of the Queen's Bench, 18 Q. B. 857.

(*j*) 2 Williams, Executors, 6th ed., 1803; Blakesley v. Smallwood, 8 Q. B. 538; 15 L. J. 185, Q. B.; see Rees v. Watts, 11 Ex. 410; 25 L. J. 30, Ex. (Ex. Ch.).

(*k*) 2 Williams, Executors, 6th ed., 1803.

(*l*) Hutchinson v. Sturges, Willes, 261, 263. Compare generally, as to set-off, 2 Williams, Executors, 6th ed., 1803; Bullen, Pleadings, 3rd ed., 680.

(*m*) As to such covenants, see *ante*.

(*n*) The executor of a lessor, on the other hand, is it would seem, under the statute (32 Hen. VIII. c. 34), relieved by assignment of the reversion from liability to be sued on covenants of the lessor which run with the land. Smith, Landlord and Tenant, 293, n. 19.

time, the lessor may still maintain an action of covenant upon an express covenant for payment of rent, even although the lessor has accepted the assignee for his tenant, and so may the assignee of the reversion, by virtue of the Statute 32 Hen. VIII. cap. 34. (*o*) So if the executor assigns the term, the lessor may afterwards bring covenant against the executor, notwithstanding any acceptance of the assignee as tenant, and so also may the assignee of the reversion." (*p*)

Hence the following rules as to the liability of an executor or administrator in actions for rent.

1. An executor is liable in his representative
[321] character for all rent accrued due in the lifetime of the testator. (*q*)

2. In an action of debt for rent accrued due after the death of the lessee, the executor may, if he enters upon the demised premises, be sued at the election of the lessor, either as executor or personally as assignee. (*r*) And the same thing holds good when the executor is sued on an express covenant for rent. (*s*)

3. If the term was assigned by the testator, the executor can not, of course, be sued as assignee, since the term never passed to him ; but he may be sued as executor in debt for the rent, if the lessor has not accepted the assignee as tenant, and even in this case he may be sued as executor on an express covenant to pay rent. (*t*)

4. If the executor himself assigns the term, he is chargeable as assignee for the time only during which he occupied the premises ; and if he is sued for rent accrued due since the assignment by himself, he is liable as executor only. (*u*)

(*o*) Brett v. Cumberland, Cro. Jac. 521, 522 ; Thursby v. Plant, 1 Wms. Saund. 241 a, n. (5).

(*p*) 2 Williams, Executors, 6th ed., 1616, 1617. See Hellier v. Casbard, 1 Sid. 266 ; Coghill v. Freelove, 3 Mod. 325 ; but see 22 & 23 Vict. c. 35, s. 27.

(*q*) 2 Williams, Executors 6th ed., 1619.

(*r*) Ibid. As, however, to the defenses which he may raise, see Bullen, Pleadings, 3rd ed., 212.

(*s*) Ibid.

(*t*) 2 Williams, Executors, 6th ed., 1624.

(*u*) Ibid., 1624, 1625.

Exception.—Contracts made by executor distinctly as executor.

"Modern authorities have established that in several instances an executor may be sued as executor on a promise made by him as executor, and that a declaration founded on such promise will charge the defendant no further than a declaration on a promise of the testator." (*x*) Thus he may be sued as executor for money paid for him in that character, (*y*) and on an account stated, as on a statement made by him as executor.

SUBORDINATE RULE. [322]

In an action against an executor or administrator, claims made against him in his representative character can not be joined with claims made against him in his personal character. (*z*)

Counts charging the defendant as executor or administrator can not be joined with counts charging him personally in his own right, and a declaration uniting such counts is bad on demurrer. (*a*)

The Common Law Procedure Act, 1852, s. 41, which allows different kinds of action by and against the same parties in the same rights to be joined, does not apply to such cases. (*b*)

RULE 76.—All co-executors or co-administrators who have administered, should be joined as defendants in an action.

When an action is brought by executors, they must, in general, all join, whether they have administered or

(*x*) Ibid., 1636.

(*y*) Ashby v. Ashby, 7 B. & C. 444.

(*z*) See corresponding subordinate rule as to plaintiffs, *ante*.

(*a*) Nor can claims against an executor as such be joined in the same count with claims against him personally Kitchenman v. Skeel, 3 Ex. 49.

(*b*) Davies v. Davies, 1 H. & C. 151; 31 L. J. 476, Ex.; Wigley v. Ashton, 3 B. & Ald. 101; Bullen, Pleadings, 3rd ed., 152, 154, 155.

not, (*c*) but the rule as to joinder is different in actions against executors or administrators; for none need be joined who have not administered.

Hence, suppose X., Y., and Z. to be co-executors, and an action to be brought against X. and Y., they can not plead the non-joinder of Z., unless they can also plead that he has administered. (*d*)

[323] An executor de son tort may be sued jointly with a lawful executor, or they each may be sued separately, but an administrator can not be sued jointly with an executor de son tort. (*e*)

It is no reason for not joining an executor as defendant, that he is a bankrupt. If a married woman is sued as co-executrix, or co-administratrix, her husband must be joined as co-defendant. (*f*)

RULE 77.—The heir may be sued on contracts of the deceased in three cases, *sc.*,

1. On contracts by deed in which the ancestor expressly binds himself and his heirs.
2. On contracts of record.
3. On covenants real.

Case 1.—Where the ancestor expressly binds himself and his heirs by a contract under seal, the heir may be sued, (*g*) but he is not bound by the simple contracts of his ancestor, nor is he bound by a bond or obligation, unless he is named, (*h*) and it is said that he is not bound unless the ancestor binds himself also: (*i*) an heir, more-

(*c*) As to the effect of non-joinder in actions on contract, see Chapter XXXIV., *post.*

(*d*) 2 Williams, Executors, 6th ed., 1787.

(*e*) 1 Williams, Executors, 6th ed., 255.

(*f*) Ibid., 1787. See *ante.* As to the effect of death, see Rules 44, 45, *ante* which apply, mutatis mutandis as well to actions against as to actions by executors, &c.

(*g*) Bacon, Abr., Heir, F.

(*h*) Barber v. Fox, 2 Wms. Saund. 134, 136.

(*i*) *Ex parte* Tindall, 8 Bing. 402.

over, is bound only provided that, and in so far as, he has legal assets from his ancestor. (*j*)

Case 2. If an ancestor bind himself by a contract of record, *e. g.*, a judgment, statute, recognizance, &c., the heir is bound.

Case 3. The heir is bound as assignee on covenants real; *i. e.*, covenants which run with the land [324] and descend to the heir. (*k*)

SUBORDINATE RULE I.

A devisee is liable under the same circumstances under which the heir would be liable.

A devisee, or person to whom freehold estate is devised by will, was not at common law liable for any contract of the devisor. But by 11 Geo. IV. & 1 Will. IV. c. 47, ss. 2, 3, 4, a devisee is placed in the same position as the heir; *i. e.*, the devisee is bound under the same circumstances, and to the same extent as the heir would have been bound if the land had come to him by descent. If there is an heir, the devisee is bound jointly with the heir, and must be sued jointly with him. (*l*) If there is no heir, the devisee is bound solely. (*m*)

A devisee of a devisee is bound as well as the original devisee. (*n*)

SUBORDINATE RULE II.

In no case can an executor or administrator be sued together with an heir or devisee.

An action can not be brought against the executor and

(*j*) Buckley v. Nightingale, 1 Str. 655.
(*k*) See *ante*.
(*l*) Bullen, Pleadings, 3rd ed., 21, 169.
(*m*) Hunting v. Shelcrake, 9 M. & W. 256. See Morley v. Morley, 25 L. J. 1, Ch.
(*n*) 11 Geo. IV. & 1 Will. IV. c. 47, s. 3; Bullen, Pleadings, 3rd ed., 160

the heir jointly, but when each are liable, the plaintiff may sue either at his choice, and may sue each at the same time. When an heir is also executor, separate actions may be brought against him in each capacity. (*o*)

(*o*) Chit., Pleadings, 7th ed., 61.

CHAPTER XIX.

ACTIONS FOR TORT.

PLAINTIFFS.—GENERAL RULES.

RULE 78.—No one can bring an action for any injury which is not an injury to himself.

It follows from the general principles already laid down (*a*) that no one can bring an action for any "tort" or injury (*b*) (*i. e.*, any interference with a right existing independently of a contract), except the person whose right has been interfered with: A., that is to say, can never sue X. merely for an injury done to B. by X.

The rule that one person can not bring an action for an interference with the rights of another, seems, at first sight, too obvious to need explanation; but it might appear, from the language in which actions are constantly described, to be subject to exceptions. Thus actions are spoken of as brought by masters for injuries to servants; by parents for wrongs to their children; or, again, by tenants or bailees for damage to the property of their landlords or bailors. It will, however, be found that in all the cases in which A. is described as suing X. for injuries to B., the real ground on which he maintains an action is the invasion of some right of his own, though it may happen that the injury to A. is the result of, or closely connected with, a wrong done to B.

Master and servant.—A master often brings an [326] action for what is called an injury to his servant. In strictness, however, the master sues, not for the injury

(*a*) Rule 2.

(*b*) For the different meanings of the term "injury," see *ante*.

to his servant, but for the injury to himself resulting from damage to his servant.[1]

"If my servant is beat, the master shall not have an action for this battery unless the battery is so great that by reason thereof he loses the service of his servant; but the servant himself for every small battery shall have an action, and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of [the loss of service], so that the original act is not the cause of his action, but the consequent upon it, viz., the loss of his service. . . . For be the battery greater or less, if the master doth not lose the service he does not have an action." (*c*)

Hence it does not matter, as regards the master's right to sue, how the injury is caused to the person of his servant, whether by an assault, (*d*) by battery, (*e*) by negligence, (*f*) or otherwise. The loss of service is, on the other hand, essential, but a service, de facto, is enough to support the action. (*g*) The master and servant have each a separate right of action, the master for the loss of service, the servant for the assault, &c. (*h*)

[327] *Parent and child.*—The right of a parent to sue for injuries to his child is the same in principle as that of a master to sue for injuries to his servant. A parent sues

(*c*) Mary's case, 9 Coke, 113 a.

(*d*) Gilbert v. Schwenck, 14 M. & W. 488.

(*e*) Mary's case, 9 Coke, 113 a.

(*f*) Hall v. Hollander, 4 B. & C. 660; Martinez v. Gerber, 3 M. & G. 88 Gough v. Bryan, 2 M. & W. 770.

(*g*) See Martinez v. Gerber, 3 M. & G. 88; 10 L. J. 314, C. P. For these and other examples, see Smith, Master and Servant, 2nd ed., 96, 97.

(*h*) The master may have a right to sue for loss of service when no injury has been done to the servant. Thus, where a servant has been enticed away from, or induced to break his contract of service, by a person who knew the servant to be in the employment of the plaintiff, the master can sue the person enticing the servant away (Lumley v. Gye, 2 E. & B. 216; 22 L. J. 463, Q. B.; 23 L. J. 112, Q. B.; Hart v. Aldridge, Cowp. 54; Blake v. Lanyon, 6 T. R. 221; Smith, Master and Servant, 2nd ed., 87–89).

[1] The relation of master and apprentice is such as will sustain an action in the name of the master for an injury to the plaintiff whereby he loses his services. Ames v. Union Ry. Co., 6 Am. Railway Reps. 267.

not as a parent, but as a master, and the ground of the action is the loss of service. He, therefore, sues for the wrong, not to his child, but to himself; and can recover damages only for the loss of service he has sustained, (*i*) and not for his wounded feelings. The service is essential. When, therefore, the defendant drove his carriage against the plaintiff's son, who was only two years and a half old, and the plaintiff brought an action of trespass per quod servitium amisit against the defendant, the action was held not to lie, for the child was not competent to perform any act of service. (*k*) If, however, there is a capacity to serve, very slight evidence is sufficient to support the allegation of service, and an action has been maintained for an injury to the plaintiff's son though only eight or nine years of age, without proof of actual service, (*l*) and (*m*) where a capacity to serve exists, the tendency of the courts is to infer service from residence with the parent without proof of actual service. (*n*) The reason, however, which used to make it desirable to sue in the name of the parent (viz., that if the child was a party to the action his evidence was excluded), no longer exists, (*o*) and in cases of doubt the action should always be brought in the name of the child.

As the parent and the child have each a separate right of action, recovery by one is not an answer to an action by the other. (*p*)

Seduction.—The action for seduction depends, in theory, upon the existence of the relation of master [328] and servant, and illustrates both the first and second (*q*) rules laid down in this chapter; since the woman seduced can not sue, having (on the ground volenti non fit injuria) suffered no legal wrong; and the

(*i*) Flemington v. Smithers, 2 C. & P. 292.
(*k*) Hall v. Hollander, 4 B. & C. 660.
(*l*) Ibid.
(*m*) Smith, Master and Servant, 2nd ed., 97.
(*n*) Jones v. Brown, Peake, 233; Torrence v. Gibbins, 5 Q. B. 300.
(*o*) 14 & 15 Vict. c. 99, s. 2.
(*p*) Edmondson v. Machell, 7 T. R. 4; Savil v. Kirby, 10 Mod. 386; Smith, Master and Servant, 2nd ed., 97, 98.
(*q*) See Rule 79.

person who can bring an action is the parent or master, who sues, in theory at least, for the wrong to him, viz., the loss of service.

The action, therefore, can be brought by any one who stands in the relation of master to the woman seduced, whether he be merely the master, (*r*) or the parent, brother (*s*) or aunt (*t*) of the woman. It is no objection that the woman was of age at the time of the seduction; and it has been held, in a case where she lived with her father and acted as his servant, (*u*) no objection to the action that she was a married woman.

But, on the other hand, service of some sort is absolutely essential. If a daughter, for instance, is in the actual service of another person, her father can not maintain the action. (*x*) In this case it would seem the master might sue. Where, again, a daughter is living independently and supporting herself and the family, neither the parent nor any one else can bring an action for her seduction. (*y*) Thus, where a woman standing in the position described was seduced, and her father brought an action for the seduction, he was nonsuited on grounds which are thus explained in the judgment of ERLE, C. J.:—

"There was no evidence that the daughter was the servant of the plaintiff in the sense in which the word servant is used in the declaration. She was herself the head of an establishment of her own, and though she conferred benefits on her father's family, she was not a [329] subordinate member of it, and did not render to the plaintiff services for the loss of which this action can be maintained." (*z*)

Very slight evidence of service will be accepted as sufficient if a daughter resides with her parents. Thus, milking cows, making tea, &c., amounts to service; (*a*) and,

(*r*) Fores v. Wilson, Peake, 55.
(*s*) Howard v. Crowther, 8 M. & W. 601.
(*t*) Edmondson v. Machell, 2 T. R. 4.
(*u*) Hooper v. Luffkin, 7 B. & C. 387.
(*x*) Dean v. Peel, 5 East, 46.
(*y*) Manley v. Field, 29 L. J. 79, C. P.; 7 C. B., N. S., 96.
(*z*) Manley v. Field, 29 L. J. 80, C. P., judgment of ERLE, C. J.
(*a*) Bennett v. Alcott, 2 T. R. 168; Carr v. Clarke, 2 Ch. 260.

indeed, it would seem that it is not necessary to prove any service beyond the services implied from the daughter's living in her father's house as a member of his family, (*b*) or, in other words, that the mere fact of her living at home is sufficient proof of service. (*c*) [1]

(*b*) Evans v. Walton, L. R..2, C. P. 615.

(*c*) Since the action for seduction, though, in theory, brought for the loss of service, is, in reality, a means of bringing an action against the seducer for the seduction itself, it exhibits several peculiarities which are not strictly consistent with the theory on which the action is supposed to rest.

First,—The seducer need not be shown to know of the existence of the service, though such knowledge is essential to the maintenance of an ordinary action brought by an employer against a person who entices away a servant from his employment.

Secondly,—The slightest evidence of service is sufficient.

Thirdly,—The parent may claim damages for the injury to his feelings (Dodd v. Norris, 3 Camp. 518).

Fourthly,—The action will not lie unless pregnancy or other illness has resulted, so as to disable the person seduced from performing her accustomed duties (Eager v. Grimwood, 1 Exch. 61; 16 L. J. 236, Ex.). Yet, where no illness has been produced, an action may be brought, not for the seduction strictly, but for enticing away the plaintiff's daughter. No allegation is then necessary, either that she was debauched, or that there was a binding contract of service between her and the plaintiff (Evans v. Walton, L. R. 2, C. P. 615).

[1] Hays v. Borders, 6 Ill. 46; McKay v. Bryson, 5 Ired. (N. C.) 216; Stout v. Moody, 63 N. C. 67; but if the action is for seducing and employing, a knowledge that he is the servant of another must be proved; Conant v. Raymond, 2 Aik. (Vt.) 243; Stewart v. Simpson, 1 Wend. (N. Y.) 376; but, if ignorant when he first employed him, if he continues the employment after knowledge, he is liable; Ferguson v. Tucker, 2 H. & G. (Md.) 182. The action for the seduction of a daughter is prima facie predicated upon loss of service resulting therefrom, but really and substantially it is an action to compensate parents for the injury to their feelings, dignity, and honor by the seduction of a daughter. No recovery can be had unless it can be shown that some services have been performed for the parent, but any, even the most trivial, service is sufficient. Badgeley v. Decker, 44 Barb. (N. Y.) 577; Ingerson v. Millar, 47 Barb. (N. Y.) 47; Moran v. Daws, 4 Cow. (N. Y.) 412 Mere residence with the parent, and rendering such general services as a daughter generally does, is enough; actual loss of service need not be shown, nor need it be shown that any actual loss pecuniarily has resulted; Lee v. Hodge, 13 Gratt. (Va.) 723; Hewitt v. Prime, 21 Wend. (N. Y.) 79; Moran v

Landlord and tenant.—Actions are often brought in the name of a tenant for a trespass on the landlord's estate; or in the name of a bailee (*e. g.*, a carrier), for

Dawes, *ante;* Knight v. Wilcox, 14 N. Y. 413; it has been held enough that the parent was entitled to her services; Mulverhall v. Milward, 11 N. Y. 343; Bartley v. Ritchmeyer, 4 N. Y. 38; even though at the time she was in the service of another; Ingerson v. Millar, 47 Barb. (N. Y.) 47; or of the defendant; Stiles v. Tilford, 10 Wend. (N. Y.) 338; and even though the parent had given her her time, and she was, at the time of her seduction, working for a third person, and had her own wages, and the expenses of her sickness were paid by her employer; Clark v. Fitch, 2 Wend. (N. Y.) 459; and even though she was in the employ of another, and did not intend to return to her father's house; Martin v. Payne, 9 Johns. (N. Y.) 987; but in all cases he must be entitled to her services, and must not have divested himself of the right to command them, for if he has apprenticed her his right of action is lost; Clark v. Fitch, *ante;* Bartley v. Ritchmeyer, 4 N. Y. 38; Briggs v. Evans, 5 Ired. (N. C.) 16; Ball v. Bruce, 21 Ill. 161; and where the action is brought by one who stands in loco parentis, actual service and the relation of master and servant at the time when the offense was committed must be established; as where the action was brought by the stepfather; Bartley v. Ritchmeyer, *ante;* by a brother, Millar v. Thompson, 1 Wend. (N. Y.) 447; and any one, guardian, master, or other person standing in loco parentis at the time of the seduction, if she was really his servant; Ball v. Bruce, 21 Ill. 161; Ellington v. Ellington, 47 Miss. 329. So, where a daughter is over twenty-one years of age, the relation of master and servant at the time of the seduction must be established, or there can be no recovery. The fact that she was seduced and then returned to her father's house is not enough; she must have been his servant at the time of her seduction; George v. Van Horn, 9 Barb. (N. Y.) 923; Nicholson v. Stryker, 10 Johns. (N. Y.) 115; Millar v. Thompson, *ante;* Vossel v. Cabe, 10 Miss. 634; Doyle v. Jessup, 29 Ill. 460; Ball v. Bruce, 21 Id. 161; but if she resides there and performs any service, even though in return for her board, it is enough; Lipe v. Eisenland, 32 N. Y. 229. In order to create a right of action, mere seduction is enough, if followed by loss of service from any cause, even though neither pregnancy nor sexual disease transpired; White v. Nellis, 31 N. Y. 405; Abrahams v. Kidney, 104 Mass. 222; and

injury to the goods of the bailor. But the tenant or bailee does not, in fact, sue for the invasion of the landlord's or bailor's rights, but for an injury to himself, *s.c.*, for an invasion of his rights as possessor (though not owner) of the estate, or the goods injured by the wrong-doers. Actions of this kind are an illustration of the rule [330] under consideration, but they are most conveniently considered in reference to the following rule:

RULE 79.—The person who sustains an injury (*d*) is the person to bring an action for the injury against the wrong-doer.

The ground of an action for tort must always be an interference by a wrong-doer with some right existing independently of any contract between the plaintiff and the defendant, (*e*) or, in other words, an injury. When, however, it is ascertained that an injury has been committed, *e. g.*, that X. has, without any legal excuse, damaged property which is not his own, it is often a point of some nicety to decide which of several individuals is the person who has a right to sue X. The principle to be borne in mind is, that the person who must be made the plaintiff in the action is the person whose legal rights have been invaded, who may or may not be the individual who would generally be considered most interested in main-

(*d*) *I. e.*, an interference with legal rights existing independently of a contract.

(*e*) See *ante*.

the action may be maintained even though the seduction was accomplished by force, and against the consent of the daughter; Daman v. Moore, 5 Lans. (N. Y.) 454. The fact that the girl is in the employ of another does not necessarily prevent the parent from maintaining an action. If he has a right to her services when he sees fit to command them a recovery may be had; the real test is, whether he has divested himself of that right; Martin v. Payne, *ante*; Mulverhall v. Milward, 11 N. Y. 343; Stiles v. Tilford, 10 Wend. (N. Y.) 33; Wood's Addison on Torts, § 1273.

taining the action. The bearing of the general rule is best shown by considering its application to the three great classes of injuries; viz., injuries to person, injuries to character, injuries to property. (*f*)

Injuries to person.—Every man has a right to recover damages for any injury done to his person, whether caused by the willful act or by the negligence of another; *e. g.*, if A. is assaulted, falsely imprisoned, &c., by X., he can recover from X. compensation both for the immediate wrong and for its consequences. For the imme-
[331] diate wrong done to the person, *e. g.*, for the mere assault, no one can sue except the person assaulted; (*g*) but if an assault by X. upon B. indirectly damages A., by depriving A. of B.'s services, A. can, as before pointed out, (*h*) sue X. for the damage done to him. It is, however, obvious that the one act,—*s.c.*, the assault,—has given a right of action to two persons, simply because the one wrongful act has interfered with the separate rights of two separate persons, *i. e.*, with the right of B. not to be assaulted, and with the right of A. not to be deprived of the services of B.

Injuries to character.—Each person libeled or slandered can sue for the injury done to himself; and though, it is conceived cases may be imagined in which a libel on A. might cause indirectly an injury to B., for which B. might perhaps sue X., the libeler, such cases must be rare; and as a general, if not an invariable, rule, the only person who can sue for a libel or slander is the person with reference to whom the libel is written or the slander uttered.[1]

(*f*) It may, perhaps, be worth noticing that the expression injuries to person, property, &c., is an abbreviated expression for injuries to a man in respect of his person, property, &c.

(*g*) See Rule 78, *ante*.

The reader should bear in mind, throughout the chapters on actions for tort, the distinction between Trespass and Case; the one being the form of action for direct, the other for indirect or consequential injury. See *ante*.

(*h*) See *ante*.

[1] See Morgan's Law of Literature, vol. i., art. LIBEL; vol. ii., art. NEWSPAPERS.

Injuries to property.—These injuries consist in damage either to real property or to personal property.

Real property.—Injuries to real property either affect the immediate enjoyment of it, *i. e.*, the possession, or, more strictly, the rights arising from the possession of it, or else affect the permanent or ultimate value of the property, or, lastly, affect both the immediate enjoyment and the permanent or ultimate value of the property. If, for example, a stranger walks across land, his act of trespass affects the immediate enjoyment of the land, but does not affect its permanent value. If, on the other hand, he digs away part of the soil, he affects, in however small a degree, the permanent value of the property, and at the same time interferes with the immediate en- [332] joyment of it in its uninjured state. (*k*)

An interference with the actual enjoyment of property is an interference with the rights of the person actually in possession. Any damage to the permanent value of real property is an interference with the rights of the owner, and, of course, may be at the same time an invasion of the rights of the person in possession. Where one and the same person is both the owner of property and actually in possession of it, as where a man owns the fee simple of land, in which he has granted no interest to any other person, and also resides on the land, it is clear that he has all the rights that can be possessed over the land, and that he, and he alone, can sue for any injury to the land, of whatever description; for he is the sole person who has rights with regard to it which can be invaded. But it often happens that different persons have different interests in the same land. A., for example, is in possession of the land as tenant for years, and has therefore a right to the immediate enjoyment or possession of it, whilst B., his landlord, has not the possession of the land, but has an interest in the permanent value of the property, or, in other words, is interested as rever-

(*k*) See, on this point, Lush, Practice, 3rd ed., 151; Addison, Torts, 3rd ed., 278–280.

sioner. (*l*) In such a case, acts which are an injury to one of the persons interested in the property may be no injury, or a different injury to the other. The general rule, therefore, under consideration (*m*) gives rise to the two following subordinate rules :—

[333] SUBORDINATE RULE I.

The person to sue for any interference with the immediate enjoyment or possession of land or other real property is the person who has possession of it, and no one can sue merely for such an interference who has not possession.

Any one, therefore, who is in possession of land, (*n*) can sue for a trespass, *i. e.*, an interference with his right to the immediate enjoyment or undisturbed possession of the property, or to use a convenient expression, can bring trespass. (*o*)

Every entry upon land in the occupation of another constitutes a trespass, for which (in the absence of legal justification) an action is maintainable. The word trespass, further, has a wider signification in legal than in popular language. "If," for example, "one man throws stones, rubbish, or other materials of any kind on the land of another, or allows his cattle, poultry, or domestic animals to go upon another's man's land, this is a trespass for which he is responsible in damages unless he can show that his neighbor was bound by contract or prescription

(*l*) The term reversioner is used as a convenient, though not strictly correct, description of any person who, not being in possession of land, has future interest in it.

(*m*) Taken in combination with Rule 78.

(*n*) The expression "land" is used for the sake of brevity; but it must be borne in mind that "real property" includes many things—*e. g.*, houses—not popularly included under the word land, and that it also includes rights over real property, *e. g.*, rights of way.

(*o*) Trespass lies for any direct and immediate interference with the possession of land, and is, therefore, the form of action most frequently referred to in this and the following pages with regard to the right of action possessed by the person in possession of land; but there are cases where the injury is indirect, or where, for other reasons, trespass will not lie, still the same general principle applies. The person in possession must sue for interference with the right to the immediate enjoyment of property.

to fence for his benefit. (*p*) To pour water out of a pail into another man's yard, or to fix a spout, so as to discharge water upon another man's land, or suffer filth to issue through a boundary wall, and to run over another's close or yard without his leave or permission, is a trespass unless a right of way over the adjoining [334] close, or a right to discharge water upon it, or a right for the passage of waste water and refuse through it, has been gained." (*q*) (*r*) So, if the occupier is turned out of his dwelling-house, of which he has possession, this amounts in point of law to an injury to the house, and may be sued for as a trespass. (*s*)

The owner in possession of his land may, of course, bring trespass, but he sues in virtue, not of his ownership, but of his possession; and the action, therefore, may be brought by a tenant in possession, though he be only a tenant at will, or (though this was at one time doubted), a mere tenant on sufferance. (*t*) Nor is it necessary that the person in possession should, in order to support this action against a wrong-doer, have any title to the land whatever; for actual possession as owner is presumptive proof of property, and is sufficient against a mere stranger who can not show any better title or authority; (*u*) nor can the defendant in such an action set up as against the person actually in possession the right of a third party, in order to rebut the mere possessory right of the plaintiff, unless the defendant can show that he himself acted by or under the authority of such third person. (*x*) If, that is to say, A. is in actual possession of land on which X., a stranger, with no title whatever, trespasses, X. can not defend himself in an action brought by A. for the trespass,

(*p*) Cox v. Burbidge, 13 C. B., N. S., 430; 32 L. J. 89, C. P.; Mason v. Keeling, 1 Ld. Raym. 608; Dawtry v. Huggins, Clayton, 32.

(*q*) Reynolds v. Clarke, 2 Ld. Raym. 1399.

(*r*) Addison, Torts, 3rd ed., 256.

(*s*) Meriton v. Coombes, 9 C. B. 972; 19 L. J. 336, C. P.

(*t*) Heyden v. Smith, 13 Coke, 67; White v. Bailey, 10 C. B. 227; 30 L. J. 253, C. P.; Bacon, Abr., Trespass, C. 3.

(*u*) Graham v. Peat, 1 East, 244; Purnell v. Young, 3 M. & W. 288; Browne v. Dawson, 12 A. & E. 624.

(*x*) Bertie v. Beaumont, 16 East, 33; Bullen, Pleadings, 3rd ed., 417.

by showing that some third person, M., was entitled to possession. (*y*) The plaintiff was possessed of glebe land, under a lease void by the statute 13 Eliz. c. 20, and it was held, (*z*) that he might maintain trespass against a wrong-doer, on the ground that any possession is legal possession against a wrong-doer; for it is an established maxim that "trespass is a possessory action, founded merely on the possession, and it is not necessary that the right should come in question." (*a*)

[335]

The occupation, moreover, of a servant or agent is the possession of his master or employer, and, it would seem, is not the possession of the servant. Where a servant was put into occupation of a cottage, and had less wages on this account, but, nevertheless, did not occupy it as a tenant, it was held, that the master might bring an action, treating the occupation as his own, for that "this was the occupation of the plaintiff through the medium of his servant, which is in law the virtual occupation of the master and not of the servant." (*b*)

On the other hand, it is absolutely essential to the maintenance of the action that the plaintiff should have possession, and possession means exclusive possession. (*c*) Hence, commissioners of sewers, who had as such commissioners erected a wall, have been held incapable of suing a person who broke it down, because the authority given them did not vest in them a possessory interest. (*d*) But when contractors for making a navigable canal had, with the permission of the owner of the soil, erected a dam upon his close for the purpose of completing their work, they were considered to have sufficient possession

(*y*) Of course, if X. acted under M.'s authority, he can show this in defense; but this is, in fact, to show that X. did not commit a trespass, and is in no way inconsistent with the principle that mere possession is sufficient basis on which to maintain an action against a wrong-doer.

(*z*) Graham v. Peat, 1 East, 243.

(*a*) Lambert v. Stroother, Willes, 221; Asher v. Whitlock, L. R. 1, Q. B 1, 5, judgment of COCKBURN, C. J.

(*b*) Bertie v. Beaumont, 16 East, 36, judgment of GROSE, J.

(*c*) See Hill v. Tupper, 32 L. J. 217, Ex.; 2 H. & C. 121; and *ante*.

(*d*) Newcastle v. Clark, 2 Moore, 265.

to enable them to maintain trespass against a wrong-doer. (*e*)

"The dam," say the Court in the latter case, "was erected by the plaintiffs at their own expense, and with their own materials, upon the locus in quo, [336] with the consent of the owner of the soil, for a special purpose. Until that purpose was completed the plaintiffs were entitled to the possession of the dam. Now, it is perfectly clear that the person in possession of property, whether rightfully or wrongfully, may maintain trespass against a mere wrong-doer. Indeed, if they had any other than a partial or subordinate interest in the dam, trespass is the only proper remedy. The case is distinguishable from that of the Duke of Newcastle v. Clark, (*f*) for there the commissioners of sewers had no possession, but had a mere right to enter upon the locus in quo, and to do certain acts. In Welch v. Nash, (*g*) the posts were put upon the lands of another without his permission; and yet it was held that the party who put them there might recover in trespass for taking them away, where the general issue only was pleaded. Now, that could be only on the ground that the posts were the property of the plaintiff; for if they were not so it would have been a good defense to the action." (*h*) "Trespass, again, will not lie for entering into a pew or seat in a church, because the plaintiff has not the exclusive possession, the possession of the church being in the parson." (*i*)

Mere occupation does not of itself amount to possession. Thus the occupation of a servant is, as before noticed, not his possession, and he can not, it would seem, maintain trespass; (*k*) and the following case well illustrates the difference between occupation and possession. The master of a school, who had possession of the

(*e*) Dyson v. Collick, 5 B. & Ald. 600.
(*f*) 2 Moore, 226.
(*g*) 8 East, 394.
(*h*) Dyson v. Collick, 5 B & Ald. 602, 603, per CURIAM.
(*i*) Stocks v. Booth, 1 T. R. 428.
(*k*) Bertie v. Beaumont, 16 East, 33. Compare Wright v. Stavert, 2 E. & E. 724; 29 L. J., 161 Q. B.

school-room, on being dismissed by the trustees, gave up the room into their possession; he afterwards re-entered and occupied it for eleven days, at the end of which time he was forcibly ejected by the trustees. It [337] was held that he could not maintain trespass for being so ejected, or, in other words, that his occupation did not amount to primâ facie possession as against the trustees. It must be added, to explain the bearing of the case, that under the pleadings the trustees relied for their defense on his not being in possession of the room. "Heath v. Milward," (*l*) says the court, "was cited in support of [the] argument [for the plaintiff]. We think that case well decided, and agree that the question of title is not to be raised on a plea of possession; we agree also that this action is possessory, and that possession is sufficient for the plaintiff in trespass against a wrong-doer. But these elementary principles must be understood reasonably. A mere trespasser can not, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession. Here, by the acquiescence of the plaintiff, the defendants had become peaceably and lawfully possessed as against him; he had re-entered by a trespass: if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession. What he could not have done on the 1st [of] July, he could as little have done on the 11th; for his tortiously being on the spot was never acquiesced in for a moment; and there was no delay in disputing it. But, if he could not have denied their possession in the action supposed, it follows clearly that they might deny his in the present action, for both parties could not be in possession." (*m*)

From the fact that trespass, or any other action for interference with the immediate enjoyment of land, must

(*l*) 2 Bing. N. C. 98.

(*m*) Browne v. Dawson, 12 A. & E. 628, 629, per Lord DENMAN, C. J.

be brought by a person who is either actually or constructively (*i. e.*, by means of his servants or agents) in possession, and that two persons can not at the same time be in adverse possession, (*n*) it follows [338] that no one can bring an action of trespass who is not in possession, or, to put the same thing in a somewhat different point of view, that the mere right to possession will not support an action for trespass to land. (*o*) "The person [for example] in whom the freehold of land is, can not maintain an action of trespass for an injury done to the land whilst it was in the possession of another. An heir-at-law may make a lease of land descended upon him before he has entered thereupon; but he can not maintain an action of trespass before he has by entry acquired the possession in fact [and, in like manner], a parson can not maintain an action of trespass . . . . for an injury done to his church, churchyard, or glebe, before he is inducted, it being the induction which gives him the possession in fact of these things." (*p*) And generally no one, whatever his title or interest in land, can bring an action of trespass before entry, *i. e.*, before he has obtained possession. It can not, therefore, be maintained by a person who has purchased an interest in land, nor by a mortgagee not in possession, nor by a devisee, (*q*) a lessee, (*r*) an assignee, (*s*) or an executor or administrator, (*t*) before entry. (*u*)

The most important result of the principle that [339]

(*n*) See Browne v. Dawson, 12 A. & E. 629. The possession of land can of course be vested in two or more persons, *e. g.*, as tenants in common; but there can not be two parties, each having a separate possession of the same land. The trustees, for instance, and the schoolmaster, in the case of Browne v. Dawson, could not each at the same time have possession of the room.

(*o*) Compare and contrast with this the rule as to actions of trespass to goods or of trover. See *post*.

(*p*) Bacon, Abr., Trespass, C. 3. See Barnett v. Earl of Guildford, 11 Exch. 19; 24 L. J. 281, Ex.

(*q*) Plowd. 142. (*r*) Wheeler v. Montefiore, 2 Q. B. 133.

(*s*) Cook v. Harris, 1 Raym. 367.

(*t*) Barnett v. Guildford, 11 Exch. 32, per PARKE, B.

(*u*) The fact that the mortgagee not in possession can not bring trespass deserves notice, since, from the rule that no action can be brought except for the infringement of a common law right (see *ante*), it might, perhaps, be erroneously inferred that the mortgagee, who is the legal owner of the land, and not the

actions for interference with the use or immediate enjoyment of real property must be brought by the person in possession, is, that when land is in the hands of a tenant, the person to sue for a trespass is the tenant, and not the landlord. Thus the latter can not sue a stranger for merely entering on his land whilst in the occupation of a tenant, even though the entry be made in exercise of an alleged right of way. For such an act, during the tenancy, is not necessarily injurious to the reversion, (*x*) and can not be sued for by the landlord as a trespass, since he is not in possession; nor, it would seem, has he the right, in the absence of any agreement, to bring an action in the name of the tenant. It has further been held, that where A. leased land to B., and during the continuance of the lease, X. committed a trespass on the land, A. could not, after resuming possession of the land, bring an action against X. (*y*) "The act here complained of," says WILDE, C. J., "was not a trespass against the plaintiff, who was not in possession at the time it was done, and, in the absence of all authority, I should say that [the defendant] could not be held a trespasser [against any person who] came into possession after the trespass was committed." (*z*)

[340] SUBORDINATE RULE II.

For any permanent injury to the value of land, or other real property, i. e., *for any act which interferes with the future enjoyment of, or title to, the land, an action may be brought by the person entitled to a future estate in it*, i. e., *by the reversioner*. (*a*)

mortgagor, was the right person to sue for all injuries to the land; the reason, of course, why the mortgagee, who is not in possession, can not bring trespass, whilst the mortgagor, who is, can, is, that the action depends, not upon the ownership, but upon the possession of land, and that therefore the mortgagor, and not the mortgagee, is the person by whom it can be brought. "But incorporeal hereditaments, which do not admit of actual entry, vest immediately, and, therefore, a lessee of tithes may maintain trespass for taking them away immediately they are set out." Lush, Practice, 3rd ed., 151, citing Wentw. 290.

(*x*) Baxter v. Taylor, 4 B. & Ad. 72.

(*y*) Pilgrim v. Southampton and Dorchester Rail. Co., 18 L. J. 330, C. P.

(*z*) Ibid., 332, judgment of WILDE, C. J.

(*a*) See Lush, Practice, 3rd ed., 154.

Though the person actually in possession of real property can alone maintain an action for mere interferences with the actual enjoyment of it, a man (*e. g.*, a landlord) who is not in possession can maintain an action for any act which injures his reversionary interest in the land. The landlord or reversioner must, in order to support such an action, show that the injury complained of is of a permanent nature, and deteriorates the marketable value of the property, so that if he were to sell the land it would fetch less money in the market. To put the same thing in another form, the landlord or reversioner can sue where the act complained of would lessen the value of the property on the expiration of the tenancy or of the estate, on the determination of which the land will come into his possession. (*b*) Suppose, for example, that A. owns the fee simple of certain land, and lets it to B. for twenty years, he can not sue X. for any damage to the land which is of a merely temporary nature, but he can sue X. for any act which affects its permanent value, or, in other words, lessens the worth of A.'s interest in it. Any act which throws a doubt upon A.'s title is an act of this description. "Thus the removal of the smallest particle of soil must in general be esteemed an injury to the reversion, because it tends to alter the evidence of title," (*c*) but a mere entry upon the land is not such an injury. (*d*) "To entitle a reversioner to maintain [an] action, it [is] necessary for him to allege and prove that the act complained of was injurious to his reversionary in- [341] terest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied with a claim of right, is not necessarily injurious to the reversionary estate." (*e*)

It is often difficult to decide whether a given act is or is not an injury to the reversion. Where, for example, light is obstructed, the owner can sue because the act

(*b*) See Addison. Torts, 3rd ed., 278, 279.
(*c*) Alston v. Scales, 9 Bing. 4, per CURIAM.
(*d*) Baxter v. Taylor, 4 B. & Ad. 72.
(*e*) Baxter v. Taylor, 4 B. & Ad. 76, per PARKE, J.

may be a denial of his right to windows, and thus prejudice his reversionary interest; (*f*) but where smoke was allowed to issue from a chimney (the erection of the chimney itself not being a nuisance, but only the use made of it), it was held that the reversioner of adjoining premises had no ground of action, although his tenants had given notice to quit in consequence, and the premises would, if the nuisance were continued, sell for less. (*g*) "After considering the authorities," say the Court, "we are of opinion, that since in order to give a reversioner an action of this kind there must be some injury done to the inheritance, the necessity is involved of the injury being of a permanent character. The earliest instances of such actions are [for] cutting trees, subverting the soil, erecting a dam across a stream so as to cause it to flow over the plaintiff's land. In the two former cases the thing done was not removeable or remediable during the term. In the third it was, but being of a permanent character it was to be assumed that it would remain, and therefore was treated as an injury to the inheritance. The decision in Jesser v. Gifford (*h*) falls within the same principle: a window was obstructed, the obstruction was of a permanent character, and would remain unless something was done to remedy the evil. Tucker v. [342] Newman (*i*) belongs to the same class. Now, the building erected in this case did not injure the plaintiff's inheritance, but it is said that the use made of it did. The real subject-matter of complaint, therefore, is not the erection of the building, but causing smoke to issue from it. If the fires had not been made by the defendant, he could not have been sued for an injury either to the possession or the inheritance. (*k*) Now, making the fires and causing smoke to issue was not an act of a permanent nature. It is very like the case of

(*f*) Metropolitan Association v. Petch, 5 C. B., N. S., 504; 27 L. J. 330 C. P.

(*g*) Simpson v. Savage, 1 C. B., N. S., 347; 26 L. J. 50, C. P.

(*h*) 4 Burr. 2141.

(*i*) 11 A. & E. 40.

(*k*) Rich v. Basterfield, 4 C. B. 783; 16 L. J. 273, C. P.

Baxter v. Taylor, (*l*) where a person trespassed, asserting a right of way, and is not distinguishable from Mumford v. Oxford, &c., Railway Company, (*m*) where the action was brought against the defendants as occupiers of certain sheds, for making noises there which caused the plaintiff's tenants to give notice to quit. The real complaint by the reversioner is, that he fears the defendant, or some other occupier of the adjoining premises, will continue to make fires and cause smoke to issue from the chimney, and if the reversion would sell for less, that is not on account of anything that has been done, but the apprehension that something will be done at a future time. According to the authorities we feel bound to say, that this is not such an injury as will enable the reversioner to maintain an action." (*n*) In a case (*o*) again alluded to in the foregoing judgment, it was held that the landlord of a house could not maintain an action for alleged injury to his reversion by reason of the noise made by the defendants hammering in the adjoining premises during the tenancy, although less rent was paid by the tenant in consequence of such noise.

On the other hand, an obstruction to a way may be of such a character as to be an injury to the reversion. "It is not to be denied," it is said by MAULE, J., "that the erection of a wall across the way,—assuming, of course, that there was no contract as between the [343] tenant of the land and the defendant,—would be an injury to the reversion, although such wall might be pulled down before the plaintiff became entitled to the actual possession of the land; and I can not doubt that there might be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff's reversionary interest as the building of a wall. The meaning of the allegation, that by means of the premises the plaintiff was greatly injured in his reversionary estate and interest, is not that the injury follows as a consequence of law

(*l*) 4 B. & Ad. 72.
(*m*) 1 H. & N. 34; 25 L. J. 265, Ex.
(*n*) Simpson v. Savage, 26 L. J. 53, C. P., per CURIAM.
(*o*) Mumford v. Oxford, &c., Rail. Co., 25 L. J. 265, Ex.; 1 H. & N. 34.

from what is previously stated—like an allegation that J. S. was seized in fee, and that he died so seized, whereby J. T., his son and heir-at-law, became entitled ; but it is an allegation of a matter of fact, as was lately held in this court in the case of Brown v. Mallett, (*p*) which is for the jury to find or not according to the evidence. I, therefore, think upon the whole that the declaration is sufficient." (*q*)

The same act which injures the landlord or reversioner is generally also an interference with the rights of the tenant. When this is so the landlord, and tenant have each separate rights of action, and may be entitled to different amounts of damages. "In the case [for example] of permanent injuries to buildings from trespasses, or acts of negligence by strangers, the tenant is entitled to sue in respect of the immediate residential injury, and the reversioner in respect of the diminished saleable value of the property. (*r*) Where trees have been injured by a [344] stranger, the lessor and lessee may both sue in respect thereof, the lessor for the damage done to the body of the tree, the lessee for the loss of the shade and fruit." (*s*) (*t*) When an action is brought for injuries of the latter kind, the damage recoverable by the reversioner is the value of the timber and the body of the tree, whilst the damage recoverable by the tenant must be estimated with reference to the value of the shade and fruit. (*u*) a value which it is obvious may fall far short of the value of the tree.

Personal property.—"Personal property [by which is here meant goods or things moveable] is essentially the

(*p*) 5 C. B. 599.

(*q*) Kidgill v. Moore, 9 C. B. 378, 379, per MAULE, J. There are some acts, such as cutting down trees, which necessarily affect the interest of the reversioner ; others, such as a mere trespass, which can not affect his interest ; and others which may or may not be injuries to him. If he brings an action for acts of the last kind, he must distinctly show on the face of the declaration, and of course prove at the trial, that they are a cause of damage to him. Metropolitan Association v. Petch, 27 L. J. 332, C. P., judgment of WILLES J.

(*r*) Hosking v. Phillips, 3 Exch. 168 ; 18 L. J. 1, Ex.

(*s*) Beddingfield v. Onslow, 3 Lev. 209.

(*t*) Addison, Torts, 3rd ed., 279.

(*u*) Ibid., 302.

subject of absolute ownership, and can not be held for any estate. The property in goods can only belong to and be vested in one person at one time. . . . Lands may be so conveyed that several persons may possess in them, at the same time, several distinct vested estates of freehold, one of them being in possession, the others in remainder, or the last, perhaps, being in reversion. But the law knows no such thing as the remainder or reversion of a chattel. It recognizes only the simple property in goods, coupled or not with the right of immediate possession." (*x*)

Any interference with rights over a chattel or goods is an interference with the rights either of a person entitled to immediate possession, or of a person entitled to future possession, *i. e.*, to possess the chattel or goods at some future time, or with the rights of both persons. A., for example, is owner of a horse, and lets it for a month to B. If X. merely takes it away from B. during the month, he interferes with B.'s right to the immediate possession. If X. permanently injures the animal, he interferes with A.'s right to possess it undamaged at the end of the month, *i. e.*, with A.'s right to future pos- [345] session, or, as it may be conveniently (though not quite accurately) termed, A.'s reversionary interest in the chattel. (*y*) X.'s act is, moreover, in this case, an interference as well with B.'s right to immediate possession, as with A.'s reversionary interest, or right to future possession. (*z*)

(*x*) Williams, Personal Property, 7th ed., ch. ii. See the whole of this chapter for the view taken throughout this and the following pages with reference to actions for injuries to personal property.

(*y*) This expression as applied to goods is, though not strictly accurate, convenient, and sanctioned by good authorities (Bullen, Pleadings, 3rd ed., 395; Mears v. London and South-Western Rail. Co., 11 C. B., N. S., 850; 31 L. J. 220. C. P.).

(*z*) The terms, right of possession, right to possess, right to possession, are, in conformity with general usage, used as synonymous. Strictly speaking, a right of possession is any right which arises from the fact of possession. A right to possession is the right to possess, which may, no doubt, arise from possession, but may also arise from other circumstances. It need, perhaps, scarcely be noted that the right to possess a chattel, either immediately or at some future time, includes in it the right to possess it uninjured.

The general rule under consideration gives rise, when applied to personal property or goods, to the two following subordinate rules :—

SUBORDINATE RULE III.

Any person may sue for an interference with the possession of goods, who, as against the defendant, has a right to the immediate possession of such goods; and no person can sue for what is merely such an interference who has not a right to the immediate possession of the goods.

A wrong-doer may interfere with another person's right to undisturbed possession of goods in various ways. X., for example, strikes A.'s horse, or removes it out of a field in which it is placed. X., in this case, commits a trespass. X., again, borrows the horse from A., and refuses to give it back on demand. He is then guilty of a wrongful detainer, and liable to an action of detinue. X. takes the horse and sells it. In this case he commits an act of what is technically called conversion, which [346] may be defined as "a wrongful interference with goods by taking, using, or destroying them inconsistent with the owner's or other persons right of immediate possession," (*a*) and is liable to an action of trover. In each instance the wrong-doer is guilty of an interference with another person's right of possession, (*b*) and in determining who is the person who ought to sue for such an interference, it is unnecessary to enter into the subtle distinctions between trespass to goods and trover or between trover and detinue. (*c*) The plaintiff has often a choice as to which of these actions he will bring. They are all brought for interferences with his right to immedi-

(*a*) Compare Bullen, Pleadings, 3rd ed., 290; Burroughes v. Bayne, 5 H. & N. 296; 29 L. J. 185, Ex.; Pillot v. Wilkinson, 2 H. & C. 72; 32 L. J. 201, Ex.; 3 H. & C. 345; 34 L. J. 22, Ex. (Ex. Ch.).

(*b*) Compare Fouldes v. Willoughby, 8 M. & W. 540; Leame v. Bray, 3 East, 593; Addison, Torts, 3rd ed. 307–310.

(*c*) Compare Selwyn, N. P., 13th ed., 581, 1276; Burroughes v. Bayne, 5 H. & N. 296.

ate possession, or are, in other words, possessory actions, and indeed, "there is no action in the law of England by which property in goods or land [as distinguished from the right to possession, either immediate or future] is alone decided." (*d*)

Trover, as being the main action for injuries to goods, is that chiefly referred to in the following pages.

The right to bring trover or trespass is often said to depend upon the plaintiff's property in the goods. Thus, it is laid down, that "the plaintiff must not only have a right of property, but a right of possession also, and unless both these rights concur, the action will not lie," (*e*) or in somewhat different language, that the plaintiff in trover must either have possession or a general or special property. (*f*)

These and similar statements, though accurate in the sense in which they are employed, may suggest that the right to maintain trover, which is merely a [347] possessory action, depends, not upon the right of possession, which is the right violated, but upon the right of property or ownership. The following is, it is submitted, the simplest account of the ground on which the plaintiff's right to sue rests: "The property in the goods is that which most usually draws to it the right of possession, and the right to maintain an action of trover is, therefore, often said to depend on the plaintiff's property in the goods. The right of immediate possession is also sometimes called itself a special kind of property, (*g*) but these expressions should not mislead the student. The action of trover tries only the right to the immediate possession, which . . . may exist apart from the property in the goods," or, in other words, the ownership of them. (*h*)

The essential point being the existence on the part of

(*d*) Williams, Personal Property, 7th ed., 26.

(*e*) Selwyn, N. P., 13th ed., 1288. Compare Wilbraham v. Snow, 2 Wms. Saund. 47 e, 47 g.

(*f*) See Addison v. Round, 4 A. & E. 804, judgment of COLERIDGE, J.

(*g*) Rogers v. Kennay, 9 Q. B. 592; 15 L. J. 381, Q. B.

(*h*) Williams, Personal Property, 5th ed., 25.

the plaintiff in trover of a right as against the defendant, to the immediate possession of goods, that action or trespass may, according to circumstances, be brought by the owner, the bailee, or the mere possessor, without title of specific goods.

The owner.—Where A., the owner of a chattel, *e. g.*, a watch, has retained all rights of property in it, and amongst others, the right to the immediate possession of it, he may maintain trover or trespass, according to the nature of the wrong done, against any person who takes it, or keeps it out of his possession, or otherwise interferes with his right to possess it uninjured. (*i*) As long as the watch is in A.'s own possession, there can be no doubt as to his right to sue any one who takes it away. But actual possession is not necessary to support this action. The right of possession is sufficient. A., for example, loses his watch. He is still owner of it, and his ownership entitles him to possess the watch when-
[348] ever he can meet with it. In legal phraseology, the property in the watch "draws with it the right of possession," and this mere right to possess enables the owner to sue any person who, having the watch, refuses to give it up to him. (*l*) Suppose, again, A. lends the watch to a friend, B.; he thereby parts with the possession, but he does not part with the ownership, which includes the right to possession. If, therefore, B. converts the watch, A. may sue him.

A. purchases specific goods. From the moment that the ownership of them has actually passed to him, although he has never had actual possession of them, he may bring an action against X., who converts them. (*m*) Thus,

(*i*) For a contrast between absolute property or ownership and special property, see Webb v. Fox, 7 T. R. 391, 398.

(*l*) Williams, Personal Property, 7th ed., p. 24; Wilbraham v. Snow, 2 Wms. Saund. 47 a; Manders v. Williams, 18 L. J. 437, 439, Ex.; 4 H. & N. 339.

(*m*) Wilbraham v. Snow, 2 Wms. Saund. 47 b. Contrast this with the position of the purchaser of land, who can not bring trespass before entry. The distinction is, that the action for trespass to land depends upon possession; the action of trover or of trespass to goods, upon the right of possession. See *ante*.

"if specific goods are sold on credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right to possession and the right of property [*i. e.*, the ownership] vest in him at once." (*n*) "He who has an absolute or general property [*i. e.*, is owner] may support this action, although he never had the actual possession; for it is a rule of law, that the property of personal chattels draws with it the possession, (*o*) so that the owner may bring either trespass or trover at his election against the stranger who takes them away. So, where a man has wreck by prescription or grant, and another takes it away, he may bring trover or trespass before seizure. . . . . Also, where A. is indebted to [B.] and [X.] to A., and it is agreed between them that [X.] shall give goods in his possession, which were the goods of A., to [B.], in satisfaction of A.'s debt, if [X] con- [349] verts them, [B.] may maintain trover against him, although he never had possession; for by agreement, the right of property was in him, and the conversion is a wrong to him. So, where an executor declares upon the possession of his testator, and a conversion by the defendant after death, it is held to be sufficient, because the property is vested in the executor, and that draws after it the possession of law" (*p*) (*i. e.*, the right to possess).

The owner of goods can generally bring trover, because ownership primâ facie and usually includes the right to possess, although the owner may divest himself of this right if he pleases; in which case he loses the right to bring trover. Since A.'s right to possess goods may depend wholly upon his being their owner, the question whether a person can bring trover often resolves itself into the inquiry, whether he has become owner of the property in certain goods, or, to employ a technical expression, whether the property in the goods has passed to

(*n*) 2 Selwyn, N. P., 13th ed., 1288; Bloxam v. Sanders, 4 B. & C. 941.

(*o*) All that is meant by this technical expression is that ownership includes, amongst other rights, the right to possess the property owned.

(*p*) Wilbraham v. Snow, 2 Wms. Saund. 47 a, 47 b.

him? A., for instance, orders goods of X. If they are actually delivered to A., there is generally little doubt that the property has passed to him, *i. e.*, that the goods have become A.'s goods, and that A. can sue X., or any other person who keeps the goods out of his possession, and this, although X. may have a cross-action against A. for the price of the goods. Suppose, however, that A. orders goods which are not delivered to him. It then becomes a matter of considerable difficulty to determine whether the property in the goods has passed to A. The determination of this question, which lies beyond the scope of the present treatise, depends partly on matters of fact, partly on rules of law. It must, however, be determined, in order to settle whether A. can bring trover against X. who keeps the goods from him. If the property in the goods has passed, A. has, as being owner, the right to possess them, and can, therefore, sue X. in trover. [350] If the property in the goods has not passed, A. has not that right of possession, which is necessary to support an action of trover. (*q*) So, again, if the question be whether a donee (*i. e.*, a person to whom goods have been given) can bring trover against a person who retains them, it is necessary to determine whether the gift was of a kind to pass the property in the goods, since otherwise the donee has no right to possess them, and therefore no right to maintain an action for an interference with the right of possession. If the gift has been a merely verbal one, the donee can not sue, for, "by the law of England, in order to transfer property by gift, there must be a deed or instrument of gift, for there must be an actual delivery of the thing to the donee." (*r*)

The question of ownership may again arise when the matter to be decided is, not whether trover can be brought,

(*q*) As to the question when the property in goods sold passes, see Benjamin, Sale, pp. 213–290.

(*r*) Irons v. Smallpiece, 2 B. & Ald. 551; Bunn v. Markham, 7 Taunt 224; Wilbraham v. Snow, 2 Wms. Saund. 47 b; Bourne v. Fosbrooke, 3 L. J. 164 C. P.; 18 C. B., N. S., 515. For further examples of the relation between the right to own property and to bring trover, see Addison, Torts, 3rd ed. 323 324

but which of two persons ought to bring it. A child, for instance, is deprived of personal goods, *e. g.*, a watch: is he or his parent the right person to sue the wrong-doer? The answer is, that property in the hands of very young children is in the constructive possession of the father and master of the house; but goods, *e. g.*, watches or books, given to a schoolboy or apprentice, and taken away from home, are the property of the boy; and if they are converted by a wrong-doer, the boy, not the parent, should sue for the injury. (*s*)

A. sends goods to B. by a carrier, X., who converts them; the question is, should A. or B. sue X., who can undoubtedly be sued by one or the other. The answer is, that he must sue X., who, having the property in the goods, has the right to possess them. "If a trades- [351] man" [the purchaser] "order goods to be sent by a carrier, though he does not name any particular carrier, such delivery operates as a delivery to the purchaser, and the whole property is immediately vested in him; and if any accident should happen to the goods, it will be at the risk of the purchaser; (*t*) à fortiori, therefore, if the purchaser select a particular carrier. (*u*) This is on the ground that a delivery to the vendee's agent is a delivery to the vendee. But where the contract is imperfect, *e. g.*, invalid by the Statute of Frauds, (*x*) or the goods are sent by a conveyance not authorized by the vendee, or not authorized to be sent at all, or the vendee retains an option to refuse the goods, the property, until acceptance, remains in the vendor, and the vendee can not maintain trover. (*y*) If A. order a tradesman to send him goods by a hoyman, and the tradesman send the goods by a porter to the house where the hoyman resides when in town, and the porter, not finding him, leave the goods with the landlord, A. can not maintain trover against the landlord, for the property never vested in A., but

(*s*) Hunter v. Westbrook, 2 C. P. 578; Addison, Torts, 3rd ed., 348.
(*t*) Dutton v. Solomonson, 3 B. & P. 582.
(*u*) Dawes v. Peck, 8 T. R. 330. See Dunlop v. Lambert, 6 Cl. & F. 627.
(*x*) Coats v. Chaplin, 3 Q. B. 483.
(*y*) Swain v. Shepherd, 1 M. & Rob. 223; Freeman v. Birch, 3 Q. B. 492.

remained in the tradesman; (*z*) but if the person to whom the goods were delivered had been a servant to the hoyman, and entrusted by him to receive the goods, A. might have maintained trover; for by such delivery the property would have vested in him, and therefore, in such case, the tradesman could not have brought trover against the hoyman." (*a*) (*b*)

In the foregoing instances, and others of the same sort, the power to bring trover depends, no doubt, in one [352] sense, upon the right of property or ownership. The reason of this is, that the right to possess goods depends, in many cases, upon the right to own them; but trover can often be supported by persons who are not the owners of property.

Bailees.—A bailment has been defined "a delivery of goods for some purpose, upon a contract express or implied, that, after the purpose has been fulfilled, they shall be re-delivered to the bailor, or otherwise dealt with, according to his directions, or, as the case may be, kept till he reclaims them." (*c*) The person who delivers the goods is the bailor; the person who receives them is the bailee. From the definition of a bailment it is clear that bailees may be of various descriptions, and possess different rights over the property placed in their hands. Thus, a hirer to whom goods are let, a pawnbroker to whom they are pledged, a workman who has a lien upon them, or a friend to whom they are lent, and others, are all of them bailees, and have, in many respects, different rights. The point to be noticed is the right which they have in common, *i. e.*, the right to the possession of the goods confided to them, for an interference with which they can maintain trover.

"It is, moreover, a doctrine universally applicable to bailment, that there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his

(*z*) Colston v. Woolaston, Bull, N. P., 35.
(*a*) See Staples v. Alden, 2 Mod. 309.
(*b*) Selwyn, N. P., 13th ed., 1280, 1281.
(*c*) 2 Steph., Com., 6th ed., 80.

contract for restitution, the bailor having still left to him the right to a chose in action, grounded upon such contract. (*d*) And on account of this qualified property of the bailee, he may, as well as the bailor, maintain an action against such as injure or take away the chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the borrower, the hirer, or any other bailee, may respectively vindicate, in their own right, this their possessory interest, against any stranger or third person; for the bailee being responsible to the [353] bailor, if the goods be lost or damaged by negligence, or if he do not deliver them up on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may injure them or take them away, so that he may always be ready to answer the call of the bailor." (*e*)

"A carrier," it is laid down by another writer, "may maintain trover against a stranger who takes the goods out of his possession; so may a factor, or other consignee, or pawnee, or trustee; so, if a house be blown down, and a stranger take away the timber, the lessee for life may bring trover, for he has a special property to make use of it for the purpose of rebuilding although the general property is in the owner. . . . So if a man lend his cattle to A. to plough his land, and a stranger takes them away, A. may maintain trover or trespass against him. The agister of cattle may also maintain trover against a stranger who takes them away. . . . So, the master of a fly-boat, who is hired by a canal company at weekly wages, may maintain trespass for cutting a rope fastened to the vessel, whereby it was being towed along, although the vessel and the rope were the property of the company. (*f*) So he who has a right to the possession of goods in respect of a lien, may bring trover for the conversion of them." (*g*) (*h*) Nor need the bailee have actual physical

(*d*) Donald v. Suckling, L. R. 1, Q. B. 585, 618.
(*e*) 2 Steph. Com., 6th ed., 83.
(*f*) Moore v. Robinson, 2 B. & Ad. 817.
(*g*) Legg v. Evans, 6 M. & W. 36.
(*h*) Wilbraham v. Snow, 2 Wms. Saund. 47 d, 47 e

possession, if he has a right to the possession; for "a person who has only a special property may, in some cases, maintain trover, although he has never had actual possession. Thus a factor, to whom goods had been consigned, but which he had never received, may bring this action." (*i*) (*k*)

[354] *Mere possessors.*—A person who has the actual possession of goods has a right to possess them against any one who can not show a better title, or, what is the same thing, who can not show that in interfering with possession of the goods, he is acting under the authority of some one who has a better title than the possessor. (*l*) Rights of action of this sort are given in respect of the immediate and present violation of the possession of the plaintiff, independently of his right of property, and are an extension of the protection which the law throws round his person. (*m*) The owner of furniture lent it to A., under a written agreement. A. placed it in the house of M., a bankrupt, and X., M.'s assignee, seized it: A. was held entitled to maintain trover against X. without producing the written agreement, (*n*) *i. e.*, without showing his title to or right of property in the furniture. So A., the plaintiff, bought a vessel which was stranded, but she was not conveyed to him according to the provisions of the Register Acts. He took possession of her, and for some days endeavored to save her, but afterwards she went to pieces, and parts of the wreck drifted upon X., the defendant's land, and were by him cut up and carted away. An action of trover was held maintainable (*o*) by A. against X. The lessees of a mine brought trover for the ore, and

(*i*) Fowler v. Down, 1 B. & P. 44.

(*k*) Wilbraham v. Snow, 2 Wms. Saund. 47 g. A bailee who has the right to immediate possession can maintain trover even against a bailor who has not such a right (Milgate v. Kebble, 3 M. & G. 100; Richards v. Symonds, 8 Q. B. 90). X. lets a horse for a month to A., and during that month takes it away: A. can sue X. (Lancashire Wagon Co. v. Fitzhugh, 5 H. & N. 502; 30 L. J. 231, Ex.).

(*l*) Armory v. Delamirie, 1 Str. 504; 1 Smith, L. C., 6th ed., 315; Jeffries v. Great Western Rail. Co., 5 E. & B. 802; 26 L. J. 109, Q. B.

(*m*) Rogers v. Spence, 13 M. & W. 571, 581.

(*n*) Burton v. Hughes, 2 Bing. 173.

(*o*) Sutton v. Buck, 2 Taunt. 302.

it was held that on a plea of not possessed, it was sufficient for them to prove their occupation of the mine from which the ore was dug, without showing any title in their lessors. (*p*) A person, again, who has absolutely no title at all as against the owner (*e. g.*, the finder of goods which are lost), may have a right of posses- [355] sion against every one else. There may be a special property (*q*) arising simply out of a not unlawful possession, which ceases when the true owner appears. (*r*) A., the plaintiff, a chimney-sweeper's boy, found a jewel, and carried it to the shop of X., the defendant, a goldsmith, to know what it was, and delivered it into the hands of his apprentice, who, under pretense of weighing it, took out the stones and called to the master to let him know that it came to three halfpence. The master offered the money to the boy, who refused to take it, and insisted upon having the thing back again, whereupon the apprentice delivered him back the socket without the stones. It was held that A. could maintain an action of trover against the goldsmith, and it was laid down "that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." (*s*) A., on entering a shop, found on the floor a bundle of notes, which had been accidentally dropped there by M., a stranger. A. handed it at once to X., the owner of the shop, with a view to its being restored to M. if he should return. X. advertised the finding in the newspapers, and M., the true owner, could not be found. A., not having intended to waive his title, offered to repay the expenses of the advertisements, and to indemnify X. against any claim, and demanded the notes back; and on X.'s refusal to give them back, sued X. A., the finder, was held entitled to recover. (*t*)

(*p*) Taylor v. Parry, 1 M. & G. 604. See 2 Wms. Saund. 47 g, note (*m*)

(*q*) *I. e.*, a sort of temporary or provisional ownership.

(*r*) Wilbraham v. Snow, 2 Wms. Saund. 47 j.

(*s*) Armory v. Delamirie, 1 Str. 504; 1 Smith, L. C., 6th ed., 315.

(*t*) Bridges v. Hawkesworth, 21 L. J. 75, Q. B. The finder must, in order

[356] If X., a wrong-doer, converts goods in the possession of A., he can not set up as a defense against A.'s right the mere title of a third party, (*u*) or, as it is called, the jus tertii. If, that is to say, A. is in possession of goods which X. takes, he can not defend himself in an action by A., by showing that a third party, M., was really entitled to the possession of the goods, unless he can show that he took the goods by the authority of M.; *i. e.*, that he was not a wrong-doer. Where X. took the wagons of A. and B., and attempted, in answer to an action by them, to set up the title of a third party, M., the law was thus stated by Lord CAMPBELL, C. J.:—

"The jus tertii could not be set up. . . . The law is, that if a person is peaceably and quietly in possession of a chattel as his own property, a person who takes it from him having no good title is a wrong-doer, and such person can not defend himself by showing that the chattel is not the property of the plaintiff, but the property of a third person. . . . . There is no difference whatever for this purpose between an action of trespass and an action of trover. In both cases the plaintiff rests on his possession of the property, and the question is, whether a person who has no title whatever of his own shall be allowed to show that the plaintiff has not the right of property [*i. e.*, right to possession]. The right of property is presumed from the possession; and is that presumption to be rebutted by evidence on the part of the defendant, a mere stranger and wrong-doer, showing that the plaintiff was not the real owner of the property? I am of opinion that that can not be done." (*x*)

to support an action of trover, be a real finder, and not a person who has taken possession of goods not in reality lost. A porter, for instance, who discovers luggage in a railway carriage, has been held not to be a finder (R. v. Pierce, 6 Cox, C. C. 107. Compare Merry v. Green, 7 M. & W. 623; R. v. Thomas, 33 L. J. 22, M. C.). Perhaps, too, he ought to be an innocent finder, and not one who becomes possessed of goods feloniously or fraudulently. But it rather seems that a possessor, even of this description, might sue a wrong-doer who took the goods from his possession (see Buckley v. Grose, 32 L. J. 131, Q. B., judgment of CROMPTON, J.).

(*u*) See *ante*.

(*x*) Jeffries v. Great Western Rail. Co., 25 L. J. 109, 110, Q. B., judgment of CAMPBELL, C. J.

Where, indeed, the plaintiff relies, not upon his [357] actual possession at the time of the conversion, but upon his right to possession, the defendant may set up a jus tertii, but this is not really setting up against the plaintiff's right to possession the superior right of a third person, but amounts to showing that the plaintiff had no right to possession at all. A., for example, bought goods of M., and allowed M. to remain in possession of them for some years. M. then became bankrupt, and M.'s assignees made no claim, and M. retained possession of the goods for some years longer, when X., the sheriff, seized them under a fi. fa. against M., and sold them. After the sale, the assignees gave notice of their claim, and the sheriff, X., paid over the proceeds of the sale to them. It was held in an action by A. against X., that X. might set up the title of the assignees. (*y*) A. had obtained possession of some tallow, part of the salvage from a fire, and his possessory right had been lawfully divested; he was held not entitled to maintain trover against X., who had subsequently purchased it. (*z*) In the last case there was, indeed, no jus tertii set up, yet both it, and in cases in which it is allowable to set up a third person's right against a claim arising from possession, rest, it is submitted, on the same principle. If the plaintiff alleges that he had a right to possession, it is allowable, either by setting up the jus tertii, or by any other means, to show that at the time of the conversion he had no right to possession whatever. If, on the other hand, he shows that he had actual possession at the time of the act complained of, then his right to possession is indubitable, and it is no answer to show the superior right or title of another party. (*a*)

Custody of servants.—Goods in the custody of a [358] mere servant are not in the possession of the servant, but in the possession of the master. A servant,

(*y*) Leake v. Loveday, 4 M. & G. 972.

(*z*) Buckley v. Grose, 3 B. & S. 566; 32 L. J. 129, Q. B.

(*a*) Compare Jeffries v. Great Western Rail. Co., 25 L. J. 110, Q. B., judgment of WIGHTMAN, J. See both as to the rules with reference to setting up the jus tertii and as to the connection between the right of ownership and the right to bring trover Bourne v. Fosbrooke, 34 L. J. 164, C. P.; 18 C. B., N. S., 515.

that is to say, is not a bailee. (*b*) Hence, a mere servant who has the custody of goods can not (it would seem) bring trover, for he has not any possession such as to give him the right of possession. "You can not make my servant whose possession is my possession, my bailee. He is not liable as a bailee. When goods are delivered to another as a bailee, the special property passes to him, but here it does not." (*c*)

Where either the bailee or bailor may bring trover.— Suppose that while A.'s watch is in the hands of B., a bailee, it is converted by X., which of them can sue X.? The answer depends upon the nature of the bailment. If it is what is called a simple bailment, as where goods are lent to a friend, entrusted to a carrier, &c., that is bailment which does not confer on the bailee a right to exclude the bailor from possession; either A. or B. may maintain trover against X. (*d*) The bailee may maintain this action, because the action depends on the right to the possession which he has by virtue of the bailment made to him, (*e*) and the bailor may also maintain it, because, as owner of the goods, he has the right of possession, and the
[359] bailment is not of such a nature as to vest this right in the bailee solely. (*f*)

The recovery of damages, either by the bailor

(*b*) See R. v. Hey, 2 C. & K. 983; R. v. Gibbs, 1 Dears. C. C. 445, and other cases on larceny; Smith, Master and Servant, 2nd ed., 284–313; and see Hopkinson v. Gibson, 2 Smith, 202, 204, 205.

(*c*) Hopkinson v. Gibson, 2 Smith, 202, 204, 205, per ELLENBOROUGH, C. J. It is important to note exactly the difference between a mere servant and a bailee. If A. gives goods to B., *e. g.*, a carrier, A. retains the right to possess the goods, but he passes the possession itself to B. If, on the other hand B. is not a carrier, but a mere servant, A., though he may give the custody or detention of the goods to B., does not pass to him the possession of them. Hence B., the bailee, has, as against third parties, a right to possession, and can bring trover; but B., the servant, having no possession, has no right to possession, and can not bring trover. It is conceived that if B. should be in any way acting, not only as a servant, but also as a bailee, he might bring an action for the conversion of the goods.

(*d*) Nicholls v. Bastard, 2 C. M. & R. 659; Manders v. Williams, 4 Ex 339; 18 L. J. 437, Ex.

(*e*) Sutton v. Buck, 2 Taunt. 302.

(*f*) Williams, Personal Property, 7th ed., 27, 28; Wilbraham v. Snow, Wms. Saund. 47 c–47 e.

or by the bailee, deprives the other of his right of action. (*g*)

By the recovery, moreover, of a judgment in an action for the conversion of goods, the plaintiff's right of property is barred, and the property vests in the defendant from the date of the conversion. (*h*)

The bailment may, on the other hand, not be a simple bailment. It may be one which gives the bailee a right to possess the goods against all the world, including the owner. In this case trover must, during the continuance of the bailment, be brought by the bailee, and not by the bailor, who has parted with the right to immediate possession.

No one can sue who has not the right to immediate possession. (*i*)—The owner of goods can not bring trover for an act of conversion committed when he has not the right to immediate possession. A. let furniture to B., his tenant. It was, during the continuance of the lease, wrongfully taken in execution by the sheriff, X., and sold. It was held that A., the landlord, could not bring trover against X., (*k*) it having been already settled that a landlord could not, under similar circumstances, maintain trespass. (*l*)

"Trover will not lie in any case, unless the property was in the actual or implied rightful possession of the plaintiff. In this case the plaintiff had neither the one nor the other pending the demise, and when that is determined, perhaps he may have his goods restored to him again in the same state in which they now are, when it will appear that he has not sustained [360] that damage which he now seeks to recover in the action." (*m*) "Here," adds LAWRENCE, J., "if the taking of the goods had determined the interest of the tenant in

(*g*) Bac. Abr., Trover, C.; Nicholls v. Bastard, 2 C. M. & R. 659.

(*h*) Cooper v. Shepherd, 3 C. B. 266; 15 L. J. 237, C. P.; Buckland v. Johnson, 15 C. B. 145; 23 L. J. 204, C. P.

(*i*) See Subordinate Rule 3, *ante*.

(*k*) Gordon v. Harper, 7 T. R. 9.

(*l*) Ward v. Macaulay, 4 T. R. 489.

(*m*) Gordon v. Harper, 7 T. R. 12, 13, judgment of ASHURST, J.

them, and re-vested it in the landlord [*i. e.*, had restored to the landlord the right to possession], I admit that the latter might maintain trover for them; (*n*) . . . . but it is clearly otherwise, for here the tenant's property and interest did not determine by the sheriff's trespass, and the tenant might maintain trespass against the wrong-doer. He is bound to restore the goods to the landlord at the end of his term, and could not justify his not doing so because a stranger had committed a trespass upon him in taking them away." (*o*) Hence, if A. pawns goods, or mortgages them to B., or gives B. a lien upon them, he can not bring trover during the continuance of the bailment. (*p*) "Gordon v. Harper, which must now be considered as settled law, shows that if a person has an interest in goods for a certain time, by agreement with the owner, the latter, during the time he is not in possession, can not maintain trover against a wrong-doer who takes the goods. That case might, with propriety, have been decided differently in the first instance; but it has been followed by others, and the court of common pleas somewhat extended the rule in Bradley v. Copley. There it was held, that where a person in possession of goods had an uncertain interest determinable by the owner, until that event happened [*i. e.*, until the interest was determined], the owner could not maintain trover." (*q*) On similar grounds, a buyer in default can not maintain trover against a seller for a re-sale of the goods sold to him, but left in the possession of the vendor, since the purchaser is deprived, by his default in payment, [361] of the right to immediate possession. He may, however, sue the vendor for a breach of contract. (*r*)

Right to immediate possession acquired.—Though the

(*n*) See Berry v. Heard, 2 Bro. Car. 242.

(*o*) Gordon v. Harper, 7 T. R. 13, 14, judgment of LAWRENCE, J.

(*p*) Milgate v. Kebble, 3 M. & G. 100; Richards v. Symons, 8 Q. B. 90 Bradley v. Copley, 1 C. B. 685; 14 L. J. 222, C. P.

(*q*) Manders v. Williams, 4 Ex. 343, judgment of PARKE, B.

(*r*) Benjamin, Sale, 594; Milgate v. Kebble, 3 M. & G. 100. Compare Martindale v. Smith, 1 Q. B. 389; Stephens v. Wilkinson, 2 B. & Ad. 320.

owner of goods, who has not acquired the right to immediate possession, can not bring trover, he may do so the moment that this right is obtained by him. Thus, A. purchases goods of X., but they are left in X.'s hands until the price is paid. If the goods are re-sold by X., whilst A. is in default, A. can not maintain an action against X., being deprived by his default of that right of possession without which trover will not lie. (*s*) Suppose, however, that, before the sale by X., A. has tendered the price, or that the goods have been bought on credit, (*t*) and before the credit has expired, X. sells. A., not being in default, may bring trover against X., or against the purchaser. (*u*) Hence, where A. bought sheep on credit, and left them in the custody of X., the vendor, who, without any default on the part of A., re-sold the sheep, it was held that, though the price had not been paid or tendered by A., the re-sale of the sheep was a conversion for which A. could maintain trover against X. (*x*)

Right to immediate possession restored or re-vested.—A bailor who has parted with the right to possession can maintain trover when the right to possession is restored to or re-vested in him. It may be restored by the natural termination of the bailment. A., for example, lets goods to B. for a month. At the end of the month, A.'s right to the immediate possession of the goods, and consequently his right to bring trover against any one who interferes with it, is restored.

But the bailment may be determined before the [362] time at which it would naturally end, and the right to immediate possession be thus re-vested in the bailor by the act of the bailee. Thus, if A. leaves his goods in the hands of X., who has a lien upon them, and X. abuses it by pledging or selling the goods, A.'s right to the possession (as a general rule) revives, and he may

(*s*) Milgate v. Kebble, 3 M. & G. 100; Benjamin, Sale, 594.

(*t*) Martindale v. Smith, 1 Q. B. 389; Chinery v. Viall, 5 H. & N. 288; 29 L. J. 180, Ex.

(*u*) Benjamin, Sale, 594, 595.

(*x*) Chinery v. Viall, 5 H. & N. 288; 28 L. J. 180, Ex. Compare Martindale v. Smith, 1 Q. B. 389; 10 L. J. 155, Q. B.

therefore maintain trover. (*y*) For a right of lien being a mere personal right which can not be parted with, it follows that a bailee who has a lien can not sell his right to another without losing his right of lien, (*z*) unless the property has been pledged to secure the repayment of money advanced with an express or implied power of sale, (*a*) for there is a clear distinction in this respect between a lien which is a mere personal right of detention and a pledge deposited to secure the repayment of money. (*b*)

The general principle is perfectly clear; viz., that when a person who has a limited interest in chattels (*e. g.*, as hirer, lessee, or pledgee of them) does any act wholly inconsistent with the contract under which he has the limited interest (*i. e.*, the bailment), he must be taken to have determined his special interest in the things, so that the lessor, pledgor, or other bailor, may maintain an action of trover as if the interest of the bailee had never been created. (*c*)

"There is a class of cases in which a person having a limited interest in chattels, either as hirer or lessee of them, dealing tortiously with them, has been held to determine his special interest in the things, so that the owner may maintain trover as if that interest had never been created. But I think in all these cases the act done by the party having the limited interest was wholly [363] inconsistent with the contract under which he had the limited interest; so that it must be taken, from his doing it, that he had renounced the contract which, as was said in Fenn v. Bittleston, (*d*) operates as a disclaimer of a tenancy at common law; or, as it was put in Johnson v. Stear, (*e*) he may be said to have violated an implied

(*y*) Scott v. Newington, 1 Moo. & R. 252.

(*z*) Clark v. Gilbert, 2 B. N. C. 257.

(*a*) Johnson v. Stear, 33 L. J. 130, C. P.; 15 C. B., N. S., 330.

(*b*) Donald v. Suckling, L. R. 1, Q. B. 585. Compare Halliday v. Holgate, L. R. 3, Ex. 299; Addison, Torts, 3rd ed., 430.

(*c*) Donald v. Suckling, L. R. 1, Q. B. 585, 614, judgment of BLACKBURN, J.

(*d*) 7 Ex. 152; 21 L. J. 41, Ex.

(*e*) 15 C. B., N. S., 330, 341; 33 L. J. 130, 134, C. P

condition of the bailment. Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them; that being so wholly at variance with the purpose for which he holds them that it may well be said that he has renounced the contract by which he held them, and so waived and abandoned the limited right which he had under that contract. It may be a question whether it would not have been better if it had been originally determined that, even in such cases, the owner should bring a special action on the case, and recover the damage which he actually sustained, which may in such cases be very trifling though it may be large, instead of holding that he might bring trover and recover the whole value of the chattel without any allowance for the special property. But I am not prepared to dissent from these cases, where the act complained of is one wholly repugnant to the holding, as I think it will be found to have been in every one of the cases in which this doctrine has been acted upon." (*f*)

The difficulty lies in determining whether a given act is or is not equivalent to a renunciation of the particular contract of bailment. Some acts, no doubt, such as the total destruction of the goods bailed, would at once terminate any kind of bailment; but whether the hirer of a chattel, *e. g.*, a horse, has the right to let it to a third person, is doubtful, and in each case the question, what acts are inconsistent with a particular bailment, must depend on the nature of the bailment and the exact terms, either express or implied, of the contract [364] under which the bailor delivered his goods to the bailee. (*g*) A person, for example, who has a mere lien, can not sell or pledge the goods in his hands without putting an end to the lien. The rights of a pledgee are more doubtful. (*h*)

"I think it unnecessary," says COCKBURN, C. J.,

(*f*) Donald v. Suckling, L. R. 1, Q. B. 614, 615, judgment of BLACKBURN, J.

(*g*) Lancashire Wagon Co. v. Fitzhugh 6 H. & N. 502; 30 L. J. 231, Ex., esp. 233, for remarks of POLLOCK, C. B.

(*h*) Legg v. Evans, 6 M. & W. 36.

"to the decision in the present case, to determine whether a party with whom an article has been pledged, as security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged,—as in the case of a valuable work of art,—that the pawnor, though perfectly willing that the article should be entrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers. It is not, however, necessary to decide this question in the present case. The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action for nominal damages if he has sustained no substantial damage, for substantial damages if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay [365] in not having the thing delivered to him on tendering the amount for which it was pledged." (*i*)

The inquiry, again, whether a hirer or lessee puts an end to the bailment by a sale of the goods leased to him, and thus restores to the bailor the immediate right to possession, presents some difficulty. It is clear that the purchaser can take no greater interest than the bailee possesses. It is also (it is submitted) established that an

(*i*) Donald v. Suckling, L. R. 1, Q B. 618, judgment of COCKBURN, C. J Compare Halliday v. Holgate, L. R. 3, Ex. 299.

absolute sale by the hirer, that is to say, a sale of more than his own interest at once, determines the bailment. (*k*) Thus B. hired goods from week to week from A., and afterwards sold and delivered them to X., a bonâ fide purchaser. (*l*) It was held that A. could sue X. in trover, on the ground that "if goods be let on hire, although the person who hires them has the possession of them for the special purpose for which they are lent, yet if he send them to an auctioneer to be sold, and that auctioneer refuse to deliver them to the owner, . . . he is guilty of conversion." (*m*) So where B. mortgaged his household furniture to A., but remained in possession of it, and upon his becoming bankrupt, his assignees sold the whole of the furniture absolutely, it was held that the sale by the assignees of B. destroyed the bailment, and that a sale by the assignees being equivalent to a sale by B. himself, A.'s representatives could maintain trover against the assignees. (*n*) "If these goods had been simply taken by a third person out of [B.'s] custody during the term stipulated for, no action of trover could have been maintained, because the plaintiffs would have had no present right to the possession. The cases of Gordon v. Harper and Bradley v. Copley, would certainly have [366] applied; but the learned counsel for the plaintiffs contended that if the bailment was for that term it was put an end to by the act of the assignees (whose act for this purpose is the same as that of B. himself) in selling the chattels absolutely before the 22nd of March, 1850, and so preventing themselves from returning them at the end of the term, and that such sale was itself a conversion; and we are of that opinion." (*o*)

But a mere wrongful taking of the goods by a third person out of the hands of the bailee is an injury to him, but does not terminate the bailment, or re-vest the right

(*k*) See Chapter XXV.

(*l*) Cooper v. Willomatt, 1 C. B. 671; 14 L. J. 219, C. P.

(*m*) Ibid., 1 C. B. 682, judgment of TINDAL, C. J., citing Loeschman v. Machin, 2 Stark., N. P. C., 311. See Bryant v. Wardell, 2 Exch. 479.

(*n*) Fenn v. Bittleston, 7 Exch 152; 21 L. J. 41, Ex.

(*o*) Fenn v. Bittleston, 7 Exch. 158, 159, per CURIAM.

of possession in the bailor; (*p*) and, further, it seems that the bailee, though he terminates the bailment by an absolute sale of the goods, yet can sell his own interests in them without producing that effect. If, for example, goods are let by A. to X. for a year, X. can probably sell the use of the goods for a year to Y. without putting an end to the lease. (*q*)

The wrongful act, not of the bailee, but of a third party, may sometimes restore to the bailor his right to possess his chattels. Suppose that B. has possession of, and a lien upon, the goods of A., X., by wrongfully taking them from the hands of B., puts an end to the bailment, and restores to A. the right of possession, and so, though if goods are let to B., the mere taking of them by X. does not determine the lease, the total destruction of them by him would (it is submitted) have that effect, and therefore restore to A. the right to bring trover.

[367] SUBORDINATE RULE IV.

Any person entitled to the reversionary interest in goods (i. e., *the reversioner*), *may bring an action for any damage to such interest, or, in other words, to his right of ultimate possession.*

If A. lets furniture to B., and X. simply takes it, or keeps it out of B.'s hands, this being no injury to A., who has not the right to immediate possession, he can not bring trover or trespass against X. He has, however, still an interest in the furniture, *i. e.*, the right to have it safe and uninjured at the end of the letting. If, therefore, X. permanently damages the goods, as for example, breaks them, he injures A., and A. may sue X. for the damage to his reversionary interest. A., the owner of a barge, let it to B. Whilst in B.'s possession, and during the continu-

(*p*) Gordon v. Harper, 7 T. R. 9; Bradley v. Copley, 1 C. B. 685; 14 L. J. 222, C. P.; Lancashire Wagon Co. v. Fitzhugh, 6 H. & N. 502; 30 L. J. 231, Ex.; Tancred v. Allgood, 28 L. J. 362, Ex.; 4 H. & N. 438.

(*q*) Dean v. Whitaker, 1 C. & P. 347. Compare Lancashire Wagon Co. v. Fitzhugh, 6 H. & N. 502, 30 L. J. 231, Ex.

ance of the lease, the barge was damaged through the negligence of X., and A. was held entitled to maintain an action for this injury. (*r*) "The question is," says ERLE, C. J., "whether the owner of the barge has a right to maintain an action for that injury? In my opinion he has that right, the mere temporary outstanding interest in the hirer of the barge amounting to nothing. That trover will not lie for the conversion of a chattel out on loan, is clear, (*s*) but in Tancred v. Allgood, (*t*) it was held that an action for a permanent injury done to a chattel whilst the owner's right to the possession is suspended, may be maintained." (*u*) "It is," adds WILLIAMS, J., "fully established that in the case of a bailment not for reward, either the bailor or the bailee may bring an action for an injury to the thing bailed; but in the case of a hiring, the owner can not bring trover, because he has tem- [368] porarily parted with the possession. It seems to me, however, to be clear that though the owner can not bring an action where there has been no permanent injury to the chattel, it has never been doubted that where there is a permanent injury the owner may maintain an action against the person whose wrongful act has caused that permanent injury." (*x*)

The injury must be permanent, otherwise the owner's interest not being affected, he can not sue. (*y*) What is a permanent injury must probably be in each case a question for the jury.

There are many wrongs for which neither trespass, trover, nor detinue will lie. None of these actions, for example, can be brought when the plaintiff suffers from some act or omission of the defendants which is not

(*r*) Mears v. London and South-Western Rail. Co., 11 C. B., N. S., 859; 31 L. J. 220, C. P.

(*s*) Gordon v Harper, 7 T. R. 9.

(*t*) 14 H. & N. 438; 28 L. J. 362, Ex.

(*u*) Mears v. London and South-Western Rail. Co., 11 C. B., N. S., 854, judgment of ERLE, C. J.

(*x*) Mears v. London and South-Western Rail. Co., 11 C. B., N. S., 854, judgment of WILLIAMS, J.

(*y*) Tancred v. Allgood, 28 L. J. 262, Ex., 4 H. & N. 438; Lancashire Wagon Co. v. Fitzhugh, 6 H. & N. 502; 30 L. J. 321, Ex.

actionable in itself but is actionable only because it has caused perceptible damage to the plaintiff, (*z*) as where the plaintiff suffers from the negligence of the defendant. The general principle, however, that each person must sue for the wrong which he has suffered, applies equally to all classes of actions.

Actions for negligence.—Under this head are included actions of essentially different kinds, *sc.*, actions for tort and actions for breach of contract. X., for example, drives his carriage negligently, and runs over A., who sues him for the damage done through his negligence. The action is in this case obviously one ex delicto. X. hires a carriage from A., and damages it through his negligent driving. Whatever be the form in which A. sues X., the action is in this case, it is conceived, though it may be called an action for negligence, one which in reality depends upon the contract between X. and A., and which is, therefore, to be considered an action ex contractu. It is possible that even in this case difference of opinion may exist as to the true character of the action, and instances certainly occur in which it is difficult to determine to which of the two classes an action for negligence ought to be referred. (*a*)

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X. and Y., a gas company, contracted to supply A., the plaintiff, with a proper pipe to convey gas from the main outside to a meter inside his premises. Gas escaped from the pipe laid down under the contract into A.'s shop. Owing to this escape an explosion of gas took place, and A.'s shop and stock were damaged, and it was found by the jury on the trial, that the escape arose from a defect in the pipe. The judges of the Court of Exchequer agreed in holding that A. was entitled to recover damages from X. and Co., (*b*) but differed as to the nature of the cause of action; KELLY, C. B., being of opinion that the "sub-

(*z*) See *ante*.

(*a*) Compare Burnard v. Haggis, 14 C. B., N. S., 35; 32 L. J. 189. C. P.; Blakemore v. Bristol and Exeter Rail. Co., 8 E. & B. 1035; 27 L. J. 167, Q. B. See Coggs v. Bernard, 1 Smith, L. C., 6th ed., 177; Addison, Torts, 3rd ed. 407–416.

(*b*) Burrows March Gas Co., L. R. 5, Ex. 67.

stantial complaint was rather of a tort than of a breach of contract," (*c*) whilst MARTIN, B., conceived the real cause of action to be a breach of contract. (*d*) The solution of any perplexity which may be thought to exist in this case is (it is submitted), that the defendant had violated two distinct rights of the plaintiff, the one to receive pipes of a certain quality under the contract, the other, not to have his property damaged through the negligence of the defendants. If the explosion had destroyed the house of B., A.'s neighbor, there is little doubt that B. could have sued X. and Co., although there was no contract between them and him.

Though the difficulty in distinguishing actions [370] for negligence which are actions ex delicto from actions for negligence which are actions ex contractu, arises partly from the nature of things, it is increased by the practice of bringing actions for breach of contract in the form of actions for tort.

Actions for torts founded on contract.—A breach of contract can (*f*) be almost always represented in form as a tort, *i. e.*, the plaintiff may sue, not for the non-performance of an agreement, but for the neglect of a duty which arises from or is connected with the agreement. A main object of adopting such a course is to enable a stranger to a contract to sue for what either is, or at any rate may be considered to be, a breach of it. (*g*)

How far can this object be attained? The reply to this question, and the general principles applying to actions for torts grounded on contract, may be summed up in the following three statements, which (it is submitted) may be fairly deduced from the cases on the subject:—

1st. An action, which in substance depends upon a breach of contract, can not be brought by any person not a party to the contract, even though it be presented in the form of an action for tort. (*h*)

(*c*) Ibid., 70, judgment of KELLY, C. B.
(*d*) Ibid., 73, judgment of MARTIN, B.
(*f*) See *ante*.
(*g*) Rule 10.
(*h*) Tollit v. Shenstone, 5 M. & W. 283 ; Winterbottom v. Wright, 10 M. &

A change in the form of an action can not substantially affect the liability of the defendant. A defendant, therefore, who is liable merely on account of a contract, can not be made liable to a person not a party to the contract, simply because such stranger to the contract treats what is really a breach of it as the neglect of a duty. "It is clear that an action on contract can not be main-
[371] tained by a person who is not a party to the contract, and the same principle extends to an action of tort arising out of a contract." (*i*)

X. contracted with the postmaster-general to provide a mail-coach along a certain line of road, and M. and others contracted to horse the coach. A. was hired by M. to drive it, and was injured while driving the coach, through its breaking down from latent defects in its construction. It was held that A. had no right of action against X., on the ground that there was no privity of contract between them. (*k*) "There is a class of cases," it is laid down in this case, "in which the law permits a contract to be turned into a tort. But unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus, a carrier may be sued either in assumpsit or on the case; (*l*) but there is no instance in which the party who was not privy to the contract entered into with him can maintain any such action. The plaintiff in this case could not have brought an action on the contract. If he could have done so, what would have been his situation if the postmaster-general had released the defendant? That would, at all events, have defeated his claim altogether." (*m*) In reply to the allegation contained in the declaration, that it was the duty of the defendant to keep the coach in a safe con-

W. 109; 11 L. J. 415, Ex.; Longmead v. Holliday, 6 Exch. 761; 20 L. J. 430, Ex.; Blakemore v. Bristol, &c., Rail. Co., 8 E. & B. 1035; 27 L. J. 167, Q. B.; Alton v. Midland Rail. Co., 19 C. B., N. S., 213; 34 L. J. 292, C. P.

(*i*) Tollit v. Shenstone, 5 M. & W. 289, per MAULE, B.

(*k*) Winterbottom v. Wright, 10 M. & W. 109; 11 L. J. 415, Ex.

(*l*) See forms of action, *ante*.

(*m*) Winterbottom v. Wright, 10 M. & W. 115, judgment of ABINGER, C. B.

dition, there was made the following observation, which applies in substance to all actions of the same description. "The duty . . . . is shown to have arisen solely from the contract, and the fallacy consists in the use of the word duty. If a duty to the postmaster-general be meant, that is true, but if a duty to the plaintiff be intended (and in that sense the word is evidently [372] used), there was none. This is one of those unfortunate cases in which there certainly has been damnum, but it is damnum absque injuria." (*n*)

On the same principle, a master has been held to have no ground of action against a railway company for loss to him through injuries to his servant, sustained by the latter through the negligence of the company when being carried as a passenger by them. (*o*) So, again, it has been settled (*p*) that a tradesman who contracts with an individual for the sale to him of an article to be used for a particular purpose by a third person, is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article. Where X. sold to A. a lamp to be used by B., the wife of A., which from its defective construction exploded and injured B., it was held that an action against X. could not be maintained by the wife, there being no wrong to her, independent of the contract which was made with the husband alone. (*p*) If fraud had existed, the person injured would have had a ground of action independently of the contract, for the wrong done to her. Hence, this case is distinguishable from others which at first sight seem to conflict with the principle that no one not a party to the contract can sue for its breach by treating it as a tort. These cases are illustrations of the principle summed up in the following proposition :—

2ndly. A person injured in consequence of the tortious act, *e. g.*, fraud, of another, may bring an action for such

(*n*) Winterbottom v. Wright, 10 M. & W. 116, judgment of ROLFE, B. See *ante*.

(*o*) Alton v. Midland Rail. Co., 19 C. B., N. S., 213 ; 34 L. J. 292, C. P.

(*p*) Longmead v. Holliday, 6 Ex. 761.

injury, even though the tort to him be connected with the breach of a contract made with a third person to which the plaintiff is a stranger. (*q*) It is, however, essen-
[373] tial that there should be a distinct tort to the plaintiff, as distinguished from the mere breach of contract.

L., the father of A., the plaintiff, bargained with X. the defendant, to buy of him a gun for the use of himself and of A., and X. sold the gun to L. for the use of himself and A., by fraudulently warranting the gun to be a safe and secure gun; A., the plaintiff, in consequence of this warranty, used the gun, which was not safe and secure, but burst and injured the plaintiff. It was held (after a verdict for the plaintiff on the plea of not guilty, and pleas denying the warranty), that an action was maintainable by A. against X. (*r*) This case is not really, though it might appear to be so, inconsistent with the principle, that a stranger to a contract can not sue for its breach. The contract was manifestly made with L., and not with A., the plaintiff; and the Court specially guard themselves against being supposed to decide that A. could sue on the contract. "We are not prepared," it is said in the judgment, (*s*) "to rest the case upon one of the grounds on which the . . . counsel sought to support his right of action; namely, that wherever a duty is imposed upon a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer; we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such

(*q*) Langridge v. Levy, 2 M. & W. 519; 4 M. & W. 338; Gladwell v. Steggall, 5 B. & C. 753; Marshall v. York, &c., Rail. Co., 11 C. B. 655; 21 L. J. 34, C. P.; George v. Skivington, L. R. 5, Ex. 1.

(*r*) Langridge v. Levy, 2 M. & W. 519; affirmed in error, 4 M. & W. 338.

(*s*) Ibid., 2 M. & W. 530. per CURIAM.

instruments and articles, as are dangerous in themselves, at the suit of any person whomsoever into whose hand they might happen to pass, and who should be [374] injured thereby." The ground on which the decision rests is, that the defendant "knowingly sold the gun to the father for the purpose of being used by the plaintiff, by loading and discharging it, and . . . knowingly made a false warranty that it might be safely done, in order to effect the sale, and the plaintiff on the faith of that warranty, and believing it to be true, . . . used the gun and thereby sustained damage," (*t*) and is, in short, that there was "fraud and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, and that therefore the party guilty of the fraud [was] responsible to the party injured." (*u*) So, where A. was induced to take shares in a company, of which X. was managing director, through a false and fraudulent representation of X.'s that the directors would guarantee certain advantages to purchasers, and thereby lost money on his shares, an action was held to be maintainable by A. against X., though in the same case it was decided, that A. could not sue X. for breach of contract, (*v*) and the ground taken in the judgment was, that no privity between the parties was necessary, and that under the "circumstances, although the parties be entire strangers to one another, an action would lie," since it "would be strange if a man who had so suffered damage from the wrongful act of another should be without remedy." Nor does the principle of the foregoing cases apply to actions for fraud only. "There are other cases, no doubt, besides those of fraud in which a third person, though not a party to the contract, may sue for the damage sustained, if it be broken. These cases occur where there has been a wrong done to that person for which he would have had a right of action, though no such contract had been made

(*t*) Langridge v. Levy, 2 M. & W. 532.
(*u*) Ibid.
(*v*) Gerhard v. Bates, 2 E. & B. 476; 22 L. J. 364, Q. B.

[375] As, for example, if an apothecary administered improper medicines to his patient, or a surgeon unskillfully treated him, and thereby injured his health, he would be liable to the patient, even where the father or friend of the patient may have been the contracting party with the apothecary or surgeon; for though no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskillfully treated him, would be liable to an action for a misfeasance. (*x*) A stage-coach proprietor, who may have contracted with a master to carry his servant, if he is guilty of neglect, and the servant sustains personal damage, is liable to him; for it is a misfeasance towards him if, after taking him as a passenger, the proprietor drives without due care, as it is a misfeasance towards any one traveling on the road. So, if a mason contracts to erect a bridge or other work in a public road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person who is injured by the defective construction, and he can not be saved from the consequences of his illegal act in committing the nuisance on the highway, by showing that he was also guilty of a breach of contract and responsible for it. And it may be the same when any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun, which he himself loaded, and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person who sustains damage from it." (*y*)

A. bought of X. a certain hair-wash for the use of B., the wife of A. X. represented it to be fit to be used for a hair-wash without causing injury to the person [376] using it; and knew that it was bought by A. for the use of B. B. used it, and was injured thereby

(*x*) Pippin v. Sheppard, 11 Price, 400; Gladwell v. Steggall, 8 Scott, 60; 5 B. N. C. 733.

(*y*) Longmeid v. Holliday, 6 Exch. 767, 768, judgment of PARKE, B.

A. and B. brought an action against X. for the injury caused to B., owing to his negligence and want of skill. Though fraud was not imputed to X., and the contract was on the face of the declaration with A., it was held, nevertheless, on demurrer, that an action could be brought by A. and B. (*z*) "The question," said KELLY, C. B, "is whether an action at the suit of the plaintiff, her husband, being joined for conformity, will lie. It is contended that it will not. There was no warranty, it is said, either express or implied, towards the purchaser himself. But it is not necessary to enter into that question, because the contract of sale is only alleged by way of inducement, the cause of action being, not upon that contract, but for an injury caused to the wife of the purchaser, by reason of an article being sold to him for the use of his wife, and so sold to the defendant's knowledge, turning out to be unfit for the purpose for which it was bought. There is, therefore, no question of warranty to be considered, but whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskillfulness and negligence in the manufacture of it, whereby the person who used it was injured. And I think that, quite apart from any question of warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased. (*a*)

3rdly. Some difference of opinion exists on the question whether certain kinds of injuries, especi- [377] ally those arising from the negligence of carriers, are, or are not, torts strictly speaking, *i. e.*, whether they

(*z*) George v. Skivington, L. R. 5, Ex. 1. B. being a married woman, the action was necessarily brought by A. & B., but in principle it may be considered an action by B.; see Rules 29 and 86.

(*a*) Ibid., 3, 4, judgment of KELLY, C. B. Conf. Ibid., 5, judgment of CLEASBY, B.

are wrongs independent of contract, or breaches of contract sued for in the form of actions for tort. (*b*)

A., the plaintiff, traveled with his master, M., by the railway company of X. & Co.; M. took and paid for A.'s ticket. It was held that A. could maintain an action against X. & Co. for the loss of his portmanteau. (*c*) The point to be decided was admitted to be whether it was necessary to show a contract between the plaintiff and the company, and the decision rested upon the ground that the action was in substance not an action on contract but an action for tort, brought against the company as carriers, and that the allegation of a contract was altogether unnecessary. (*d*)

Where A., the plaintiff, a child, a little more than three years old, was taken by his mother by the railway of X. and Co., and the mother took a ticket for herself, but none for A., A. was held entitled to bring an action against X. & Co. for injuries received by him whilst a passenger. (*e*) In this case it is laid down by BLACKBURN, J., that "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." (*f*)

A., the plaintiff, and his goods were carried by X. & Co., under a contract on the part of X. & Co. with the Indian Government, to carry certain persons, of [378] whom A. was one; A.'s goods were destroyed by the defendants' negligence. It was held that A. could not sue X. & Co. for breach of contract, but that he was entitled to sue for an injury done to his property through their negligence whilst in their custody. (*g*) "As for the first count which sounds in contract, and in substance, though not in form, charges a violation of a

(*b*) See, as to the nature of actions for torts founded on contract, *ante*.

(*c*) Marshall v. York., &c., Rail. Co., 11 C. B. 655; 21 L. J. 34, C. P.

(*d*) Ibid., 663, 664, judgment of WILLIAMS, J.; Collett v. London and North-Western Rail. Co., 16 Q. B. 984; 20 L. J. 411, Q. B.

(*e*) Austin v. Great Western Rail. Co., L. R. 2, Q. B. 442; 36 L. J. 201, Q. B.

(*f*) Ibid., L. R. 2, Q. B. 445. Judgment of BLACKBURN, J.

(*g*) Martin v. Great Indian Rail. Co., L. R. 3, Ex. 9; 37 L. J. 27, Ex

contractual obligation, the plea (*h*) is a sufficient defense; for if the contract was not with the plaintiff but with other persons, and the only charge is one of non-performance of the obligation created by it, no action can be maintained, except by the person with whom the contract was entered into. As to the second count, which charges the defendant with negligence, and by which it appears that the plaintiff's luggage was lawfully on the defendant's railway, and being properly there, was lost by their neglect, I should have been disposed to think that the neglect and breach of duty charged constituted only a breach of duty constituted by contract, and that the contract being made with persons other than the plaintiff, the plea [count?] was liable to the same objection as the last. But my learned brothers take a different view, and think that the second count charges a wrong done, by which the plaintiff is affected in his property, and for which, therefore, independently of contract, he has a right to obtain redress." (*i*) The ground of the judgment is thus stated by BRAMWELL, B.: (*j*)—"The plaintiff says, 'You had my goods in your possession, and you delivered them wrongly, no matter whether willfully or negligently; either way you did wrong.' The defendants reply, 'I bargained with some one else to carry them.' But how does this furnish an answer? The contract is no concern of the plaintiffs; the act was none the less a wrong to him."

On the other hand, a decision before referred [379] to, (*k*) that a master can not sue a railway company for damage to him from injuries to his servant when traveling as a passenger by their railway, rests avowedly on the ground that the duty of the company to carry a passenger safely is a duty arising from a contract. "I take the law," it is said by ERLE, C. J., "to be clear, that where a servant is injured by matter ex delicto, and his

(*h*) In effect that the contract was not with the plaintiff.

(*i*) Ibid., L. R. 3 Ex. 13, per KELLY, C. B.

(*j*) Ibid., 14, judgment of BRAMWELL, B.

(*k*) Alton v. Midland Rail. Co., 19 C. B., N. S., 213; 34 L. J. 292, C. P

see *ante*

master in consequence loses the benefit of his services, the master may have an action against the wrong-doer for that consequential damage. The distinction upon which I rely is that in all cases where the master has recovered damages in such an action the injury has been occasioned to the servant by the tortious act of the defendant. I find none where the damage has arisen by means of a breach of contract. . . . Here, the action is founded upon a contract entered into between the company and the servant." . . . The liability of the "defendants, if any, arises out of contract, and there is no contract between" them and the plaintiff. (*l*)

That the courts have not been quite consistent in the view they have taken of actions for torts founded on contract is (it is submitted) clear. (*m*) But the difference of the view entertained in the different cases is less than it might at first sight appear; for though such cases as Austin v. Great Western Rail. Co., and Marshall v. York, &c., Rail. Co., (*n*) treat the obligation of carriers as existing independently of contract, the decision in these [380] cases and others like them may be maintained on the ground (*o*) taken by some of the judges, that a contract did exist between the plaintiff and defendants, *i. e.*, that in the one case the master, and in the other, the mother contracted as agent for the plaintiff. Martin v. Great Indian Rail. Co., (*p*) again, was not decided with the approval of KELLY, C. B., and is a somewhat peculiar case. It should further be noticed that the earlier cases in which the nature of actions against carriers is considered, have reference to the admissibility of a plea in

(*l*) Ibid., 19 C. B., N. S., 236, 237, 239, judgment of ERLE, C. J.

(*m*) Compare Martin v. Great Indian Rail. Co., L. R. 3, Ex. 9; 37 L. J. 27, Ex.; Austin v. Great Western Rail. Co., L. R. 2, Q. B. 442; 36 L. J. 201, Q. B.; Marshall v. York, &c., Rail. Co., 21 L. J. 34, C. P.; 11 C. B. 655; Collett v. London and North-Western Rail. Co., 16 Q. B. 984, with Alton v. Midland Rail. Co., 19 C. B., N. S., 213; 34 L. J. 292, C. P.; Powell v. Leyton, 2 N. R. 365–370; and see George v. Skivington, L. R. 5, Ex. 1.

(*n*) L. R. 2, Q. B. 442; 36 L. J. 301, Q. B.

(*o*) 21 L. J. 34, C. P.; 11 C. B. 655. See esp. Austin v. Great Western Rail. Co., L. R. 2, Q. B. 447, judgment of LUSH, J.

(*p*) L. R. 3 Ex. 9; 37 L. J. 27, Ex.

abatement for non-joinder of a defendant, and that his point may be considered to be one of procedure, and therefore dependent upon the form in which an action is brought without reference to its real nature.

RULE 80.—1. Persons who have a separate interest and sustain a separate damage must sue separately.

2. Persons who have a separate interest, but sustain a joint damage, may sue either jointly or separately in respect thereof.

3. Persons who have a joint interest must sue jointly for an injury to it. (*q*)

If A. and B. have separate rights and sustain separate damage from the violation of these rights, A. and B. have each a perfectly separate cause of action, and must sue separately. If A. and B. have separate rights, yet the act of the wrong-doer causes them a joint damage; they may treat the wrong either as a wrong to both of them, and sue jointly for it, or as a wrong to each [381] of them separately and sue separately for it. If, lastly, A. and B. have a joint right, that is to say, if the right invaded is not a right of A. singly, or of B. singly, but one possessed by them in common, then they must sue jointly for the wrong done.

For an assault, false imprisonment, and generally for all injuries to the person, each person injured must sue separately; for the assault, imprisonment, &c., done to the one is not the same as the assault, imprisonment, &c., done to the other. (*r*) So also if a man says to A. and B., "you have murdered M.," or imputes to them any other crime, they can not join in one action against him for speaking these words, but each of them must bring a separate action; for the wrong done to one is no wrong done to the other. (*s*)

(*q*) Broom, Parties, 2nd ed., ss. 256–259; Coryton v. Lithebye, 2 Wms. Saund. 116.

(*r*) Coryton v. Lithebye, 2 Wms. Saund. 117 a.

(*s*) Ibid.

When several owners of mills brought an action for not grinding corn thereat, it was held that they might join as plaintiffs, since, although their interests were several, yet the not grinding at any of their mills was a joint damage. So the dippers at Tunbridge Wells were held entitled to join in suing a person who exercised the office of dipper without being duly appointed; for, although severally entitled to receive gratuities for their separate use, yet with regard to a stranger disturbing them in their employment, they were all jointly concerned in point of interest. (*t*) So two or more partners may join in an action of slander for words spoken of them in the way of their trade. (*u*)

If A. and B. have a joint interest which is injured, or in other words, if the right interfered with is a [382] right possessed by A. and B. in common, they must (*x*) join in an action for an interference with it. Therefore, the joint owners of a chattel, and partners generally, must join in an action for injury to the common property. (*y*)

RULE 81.—The right of action for a tort can not be transferred or assigned. (*z*)

This is merely an application to actions for tort of the general principle that a chose in action is not assignable.

RULE 82.—Where several persons have a joint right of action for a tort it passes on the death of

(*t*) Weller v. Baker, 2 Wms. Saund. 116, note 2. See Broom, Parties, 2nd ed., s. 257.

(*u*) Cooke v. Batchelor, 3 B. & P. 150; 2 Wms. Saund. 117 a, 117 b; Le Fanu v. Malcomson, 1 H. L. C. 637; Lindley, Partnership, 2nd ed., 481, 482. As to actions by partners, see Chapter XXI.

(*x*) But see, for the effect of non-joinder of plaintiffs in actions of tort, Chapter XXXIV.

(*y*) Sedgworth v. Overend, 7 T. R. 279; Addison v. Overend, 6 T. R. 766; Longman v. Pole, 1 Moo. & Mal. 223; Coryton v. Lithebye, 2 Wms. Saund. 116 a. See Chapter XXI.

(*z*) See Rule 6.

each to the survivors, and on the death of the last (if the right of action be one that survives) (*a*) to his representatives.[1]

The rule is the same as in actions on contract. (*b*)

Where the person injured can sue either separately or jointly, the separate right of action passes, if it survives at all, to the personal representatives of the deceased.

(*a*) See Rules 92 and 93.

(*b*) See Rule 16. But the non-joinder of a plaintiff in action for tort has no greater effect than that of enabling the defendant to plead the non-joinder in abatement. See Rule 117.

[1] As to relative rights of action of heirs or devisees and personal representatives, see Dobbs v. Gulldge, 4 Dev. & Batt. 68; Roosvelt v. Ellethorp, 10 Paige, 415; Thomas v. Cameron, 16 Wend. 579; Varick v. Bodine, 3 Hill, 444; Flinn v. Chase, 4 Den. 85; Grim v. Carr's Administrators, 3 Pa. St. 523. Where one Carr, in his lifetime, falsely represented to plaintiff that he had obtained a divorce from a former wife, who was living apart from him, and thereby induced plaintiff to marry him, which she did, discharging all her duties to him as his lawful wife for two or three years, when he died,—*Held*, in Pennsylvania, that an action for the deceit could not be brought against the deceased's estate, either by the plaintiff, or by the child she had borne him. And so in New York it was held that the personal representatives of a deceased father could not maintain an action for damages for the seduction of a daughter. George v. Van Horn, 9 Barb. 523; and see Blakeney v. Blakeney, 6 Port. 109. The executor may sue on notes due the testator, even though secured by mortgage specifically bequeathed. Cryst v. Cryst, Smith's Indiana Reps. 370; Brink v. Means, 11 B. Mon. 217. Or for trespass. Kennerly v. Wilson, 1 Md. 102; Upper Appotomac Co. v. Harding, 11 Gratt. 1. Unless the tort occurred in testator's lifetime. Moore v. Clayton, 3 S. & M. 373; McLaughlin v. Dorsey, 1 Har. & McH. 224. And it is no objection that the action arose out of tort. Dickerson v. Tyner, 4 Blackf. 253; and see Salliday v. Bessey, 2 Jones, 349; Millenberger v Schlegel, 4 Barr, 244. But the administrator of a grantee of land containing covenants which run with the land can not sue without showing a special damage to his intestate. Martin v. Baker, 5 Blackf. 232; Nettles v. D'Oyley, 2 Brev. 27.

CHAPTER XX.

PRINCIPAL AND AGENT.

RULE 83.—A principal (or employer) can never sue for what is merely an injury to his agent (or servant), nor an agent (or servant) for what is merely an injury to his principal (or employer).

A principal or employer can in many cases sue for what is called an injury to his servant, but the real ground on which he sues is, as already pointed out, not the injury to his servant, but the injury to himself resulting from or connected with the injury to his servant. So an agent may in some cases sue for what is popularly called an injury to his employer, *e. g.*, a carrier can bring an action for the conversion of goods confided to his care; but though this case is somewhat peculiar, the ground on which the agent sues is not the injury to his employer, but the interference with his own rights as possessor of the goods. (*a*)

(*a*) See *ante*, and *post*, 458.

CHAPTER XXI.

PARTNERS.

RULE 84.—All the partners in a firm, or members of an unincorporated company, (*a*) should join in an action for wrong done to the firm or company.

As a firm is nothing but the persons who compose it, (*b*) the rules with reference to actions by partners are simply applications of the rules as to joinder of plaintiffs in an action for tort. (*c*) Where an injury has been done to their joint rights, *e. g.*, where the property of the firm has been converted, all the members of the firm, A., B., and C., must join in an action for the wrong.

The same wrongful act may give a separate right of action to the individual partner A., and to the firm collectively, *i. e.*, to all the partners, A., B., and C.; for the same act may interfere at once with the individual rights of A., and with the joint rights of A., B., and C. "These doctrines are illustrated by actions for libel. A libel can clearly be made the subject of an action in the name of all the partners, if the firm has been damnified; (*d*) and if the libel reflects directly on one partner, and through him on the firm, two actions will lie, viz., one by the party libeled, and the other by him and his [385] co-partners; but the damage in the first action must not appear to be joint, nor must that in the second

(*a*) An unincorporated company, as already pointed out, is in substance a firm. See, however, as to companies empowered to sue by a public officer, *ante*. See Rule 117.

(*b*) See *ante*. (*c*) Rule 80, 81.

(*d*) Cooke v. Batchelor, 3 B. & P. 150; Foster v. Lawson, 3 Bing. 4 2; Williams v. Beaumont, 10 Bing. 260; Metropolitan Saloon Company v Hawkins, 4 H. & N. 87; 28 L. J. 201, Ex.

appear to be confined to the libeled partner only. (*e*) If one partner is libeled, and the firm can not be shown to have been damnified, an action for the libel should be brought in the name of the individual partner aggrieved, and not by the firm; (*f*) and he may sue alone, although the libel more particularly affects him in the way of his business." (*g*)

Change of partners.—All the partners should join who were members of the firm at the time when the wrong was committed. If, therefore, X. converts the goods of A., B., and C., and before any action is brought, C. leaves the firm and D. enters into it, the persons who should properly sue for the tort are A., B., and C., since the wrong was an interference with their right of possession; and similarly it would seem that an action for a libel on the firm of A. & Co. ought to be brought by the persons who composed the firm at the time of the publication of the libel.

Can one partner sue another for tort?—One partner can, of course, sue another for torts unconnected with the partnership. It seems, moreover, that where one partner commits a wrong against his fellow-partners, the latter can join in suing him. "If a person," says Lord TENTERDEN, "colludes with one partner in a firm to enable him to injure the other partners, they can maintain a joint action against the persons so colluding." (*h*)

From the fact that partners are joint owners of the partnership property, combined with the rule that the same person can not be both plaintiff and defendant, (*i*) it results that one partner often can not bring trover [386] against another under circumstances in which the action would be maintainable against a stranger. A joint owner of goods can not maintain trover against his co-owner in respect of any act of the latter consistent

(*e*) Harris v. Bevington, 8 C. & P. 708; Forster v. Lawson, 3 Bing. 452; 2 Wms. Saund. 117 b.; Haythorne v. Lawson, 3, C. & P. 196.

(*f*) Soloman v. Medex, 1 Stark, 191.

(*g*) 1 Lindley, Partnership, 2nd ed., 481.

(*h*) Longman v. Pole, Moo. & Mal. 233.

(*i*) Rule 5.

with his ownership; but if the latter is guilty of an act inconsistent with joint ownership, as a complete destruction of the goods or sale of them in market overt, it amounts to a conversion, for which the joint owner can sue. (*j*) Thus, where A. and B. were members of a friendly society, and A. was entrusted with a box containing the sums of money subscribed, and was bound by bond to keep it safely, it was held, that he could not maintain trover against B., and against a stranger, when B., having got possession of the box, carried it away and delivered it to the stranger. (*k*) So a mere sale by B., not in market overt, does not amount to a conversion, or give the joint owner, A., a right to sue him. (*l*) So, the creation of a lien by one of two joint owners does not amount to a conversion. But if B. sells the goods in market overt, so as to pass the whole property to the purchaser, or if he destroys them, if, in short, he does any act totally inconsistent with the joint ownership, this is a conversion, and A. may bring trover against him. (*m*)

RULE 85.—An action for an injury to the property of a firm must be brought:

1. On the bankruptcy (*n*) of the firm, by the trustee or trustees of the bankrupts;

2. On the bankruptcy of one or more partners, by the solvent partners, together with the [387] trustee or trustees of the bankrupt partner or partners. (*o*)

The explanation of this rule, in reference to actions ex contractu, (*p*) is applicable to actions ex delicto.

(*j*) Higgins v. Thomas, 8 Q. B. 908; Jones v. Brown, 25 L. J. 345, Ex.; Mayhew v. Herrick, 7 C. B. 229.

(*k*) Holliday v. Camsell, 8 T. R. 358

(*l*) Mayhew v. Herrick, 7 C. B. 229.

(*m*) See Bullen, Pleadings, 3rd ed., 272, 716.

(*n*) Rules 89 and 90.

(*o*) See as to unincorporated companies, *ante*.

(*p*) See *ante*.

An action for tort can, however, sometimes be brought by a solvent partner and the trustee, when it could not have been maintained by the solvent partner and the bankrupt if the latter had remained solvent, for the trustee's title relates or dates back to the act of bankruptcy, and he, therefore, can often treat dealings of the bankrupt as null. The trustee can also treat as void some acts of the bankrupt, on account of their fraudulent character. Hence, if A. and B. are partners, and B., after he has committed an act of bankruptcy, indorses a partnership bill, such indorsement confers no title on the indorsee, and A. and B.'s trustee can bring an action against the indorsee for it. (*q*) So, where A. and B. were partners, and B. fraudulently indorsed certain bills of exchange belonging to the partnership to X., in payment of a private debt, X. being aware of the fraud, it was held on B.'s bankruptcy that the assignees might disaffirm the transaction as a fraudulent preference, and join with A. in an action against X. (*r*)

As the trustee of a bankrupt becomes a tenant in common (*s*) with the solvent partner of the property of the firm whereof the bankrupt was a member, he frequently is unable to make use of the doctrine of relation, in order to recover the bankrupt's interest in goods which have been sold by the solvent partner after the commission of the act of bankruptcy. (*t*) That is to say, if [388] A. and B. are partners, and after the commission of an act of bankruptcy by B., A. sells partnership goods to X., B.'s trustee can sue neither A. nor X. for the value of the goods, though if B., not being in partnership, and after the commission of an act of bankruptcy, sold goods to X., who knew of the act of bankruptcy, the trustee could, even though X. had paid for the goods, bring an action of trover against him.

(*q*) Thomason v. Frere, 10 East, 418.

(*r*) Heilbut v. Nevill, L. R. 4, C. P. 354.

(*s*) See *ante*.

(*t*) Fox v. Hanbury, Cowp. 445; Smith v. Stokes, 1 East, 363; Buckley v. Barber, 6 Ex. 182; 2 Lindley, Partnership, 2nd ed., 1118–1123.

CHAPTER XXII.

HUSBAND AND WIFE.

RULE 86.—A husband and wife must sue jointly in three cases :—

1. For injuries to the person, character, or property of the wife, committed before marriage ;

2. For injuries to the person or character of the wife committed during coverture ; and,

3. For injuries for which the wife must sue as executrix or administratrix. (*a*)

For all wrongs done to a woman before marriage, (*b*) she and her husband must sue jointly during coverture. If, for example, X. assaults B., an unmarried woman, or trespasses upon her land, or appropriates her goods, and B. afterwards marries A., an action for the wrong must be brought in the joint names of A. and B. The action is in fact brought by B., and A. is joined merely (to use the technical expression) for the sake of conformity ; *i. e.*, to comply with the rule that a married woman can not sue alone. The same rule, it would seem, applies if X. libels B., or slanders her before marriage. If, however, the slanderous expressions are not words actionable in themselves, but actionable only because they [390] cause damage, and the damage results from them

(*a*) See Bullen, Pleadings, 3rd ed., 338, 339. For the explanation of the rule that a wife can not, during coverture, sue without her husband, and of the exceptions thereto, see *ante*. The rule and the exceptions apply as well to actions for tort as to actions on contract.

(*b*) Milner v. Milnes, 6 T. R. 627, 631. See Lush, Practice, 3rd ed., 158 ; Bullen, Pleadings, 3rd ed. 339.

after the marriage, A., the husband, must apparently sue alone. (*c*)

To the rule under consideration there are to be found one or two apparent exceptions. As "all the personal chattels of the wife [vest] by the marriage in the husband, where goods bailed or come to the hands of another before marriage are detained afterwards, the husband may sue alone as on his own possession. (*d*) . . . If a nuisance be erected before marriage, and continued afterwards, producing a temporary damage to the husband, he alone may sue. (*e*) If a feme sole possessed of a term for years in a close has in right thereof a way through an adjoining field, and the owner obstructs the way by building on it, and the feme marries, the husband may maintain an action for the continuance of the obstruction." (*f*) (*g*) But in these and like cases the husband's right to sue alone depends upon an injury to him taking place after the marriage, *e. g.*, by the continuance of the obstruction to the right of way, and it is often the case that there may be two actions, one in the name of the husband and wife for the original wrong, and another in the name of the husband only for a continuance of it. (*h*)

With respect to injuries to the person of the wife during coverture, the husband and wife must join in suing. But the wrongful act, *e. g.*, an assault upon the wife, may involve two distinct wrongs, and thus give two distinct causes of action. The first is the assault upon the wife, and the second is the damage caused thereby [391] (through loss of service) to the husband. (*i*) The

(*c*) The offense sued for is here in reality the causing of damage by certain slanderous expressions, and as this injury is not committed until the damage is caused, *i. e.*, until after the marriage, it affords no real exception to the principle that a wife must join in an action for wrongs done to her before marriage. Compare Saunders v. Edwards, 1 Sid. 95; Coleman v. Harcourt, 1 Lev. 140, cited Saville v. Sweeney, 4 B. & Ad., 514; Selwyn, N. P., 13th ed., 245; and see Backhouse v. Bonomi, 9 H. L. C. 403.

(*d*) Blackburne v. Greaves, 2 Lev. 107.

(*e*) Frosdick v. Sterling, 2 Mod. 269.

(*f*) Baker v. Brereman, Cro. Car. 419.

(*g*) Lush, Practice, 3rd ed., 158, 159.

(*h*) Ibid.

(*i*) See *ante*.

husband can not sue alone merely for the injury to the wife, but he may sue alone for the damages occasioned thereby to himself solely. On the other hand, the husband and wife can not, in an action brought solely for the injury to the wife, claim compensation for the injury to the husband from the loss of the wife's services. In order to obtain full compensation two actions used to be necessary: one by the husband and wife for the injury to the wife; another by the husband alone for the damage caused thereby to him. By the Common Law Procedure Act, 1852, s. 40, "in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, the husband may add thereto claims in his own right; and separate actions brought in respect of such claims may be consolidated, if the court or a judge shall think fit; provided, that in the case of the death of either plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive shall abate." This section is not imperative, and after a recovery in the joint action for the injury to the wife, the husband may bring a separate action for his claim in his own right in respect of the same injury. (*j*) The claims which the husband may add in his own right are not limited to those which arise consequentially from the injury to the wife. (*k*) (*l*)

In like manner, in an action for slander of the wife, if the words are actionable per se, the husband and wife must join for the direct injury; (*m*) but the husband must sue alone for consequential damage; (*n*) and so also, if the words are not actionable in themselves, but only because they cause damage; (*o*) and now (though [392] the husband may sue alone for the damage to himself) there may, under the section of the Common Law

(*j*) Brockbank v. Whitehaven Junction Rail. Co., 7 H. & N. 834; 31 L. J. 349, Ex.

(*k*) Hemstead v. Phœnix Gas Co., 3 H. & C. 745; 34 L. J. 108, Ex.

(*l*) Bullen, Pleadings, 3rd ed., 338.

(*m*) Dengate v. Gardiner, 4 M. & W. 5.

(*n*) Ibid.

(*o*) Saville v. Sweeney, 4 B. & Ad. 514; Broom, Parties 2nd ed., s. 281.

Procedure Act, 1852, before cited, be combined in one declaration claims for the direct injury to the wife, and for the indirect or consequential damage to the husband. If the slander is actionable only because of the damage it causes, since that damage is damage to the husband, he must sue alone, and the wife can not join.

Where a wife has a right of action in a representative character as executrix or administratrix, husband and wife must join in suing. (*p*)

Effect of death.—In cases where the wife must join, the right of action remains on the death of her husband in the wife, and she, and not her husband's representatives, is the proper person to sue for the injury; on the death of the wife, the right of action passes to her representative, unless the right of action depends upon her character of executrix or administratrix, in which case it passes to the representative of the testator or intestate.

Effect of divorce.—Divorce, it seems, has the same effect on the wife's rights of action as the death of the husband. (*q*)

RULE 87.—A husband may sue either alone or jointly with his wife for all injuries done during coverture to real property, of which the husband and wife are seised, or to which they are entitled in right of the wife. (*r*)

[393] The rule as to the joinder of husband and wife in actions for injuries in respect of the latter's real property during coverture, is not quite clear. In many cases the husband and wife may sue jointly. (*s*) It is also clear that in some cases the husband may sue alone.

(*p*) Broom, Parties, 2nd ed., s. 286; Serres v. Dodd, 2 B. & P. 407; Roper, Husband and Wife, 2nd ed., 189; Thompson v. Pinchell, 11 Mod. 177.

(*q*) See *ante*; Capel v. Powell, 34 L. J. 168, C. P.; Head v. Briscoe, 5 C. & P. 484. Chapter XXX.

(*r*) Bullen, Pleadings, 3rd ed., 339; Bidgood v. Way, 2 Blackstone, 1236; Wallis v. Harrison, 5 M. & W. 142; 1 Wms. Saund. 291 m.

(*s*) Co. Litt. 185.

Where, for example, the husband having an interest in the wife's real estate, grants leases thereof during their joint lives, reserving the rent to himself, and making his wife no party to the lease, he can sue alone for damage to his reversionary estate, (*t*) and the husband frequently may sue alone for damage which does not affect the substance of the wife's freehold estate, as for breaking and entering into a close and carrying away the grass, though in this case he might also sue jointly with his wife. (*u*) If the husband is the actual occupier of his wife's freehold lands and tenements, he may sue alone for all damage done to his beneficial occupation and enjoyment of the property. (*v*) The general rule, therefore, seems to be, that for injuries in respect of the wife's real property, the husband has usually the option of suing either alone or jointly with his wife; but it is possibly subject to the following exception:

Exception.—Where a permanent injury is done to the wife's freehold.

When the wrong is committed "on the wife's freehold or inheritance, and it goes to affect either the title or the substance of the estate, the wife is a necessary party. (*x*) For cutting down trees, removing the soil, diverting water, erecting a nuisance, &c., both must join. So, the wife must join in detinue or trover for the title deeds; (*y*) or slander of her title, and for a deed granting her a rent-charge for life." (*z*) (*a*) Such deeds, &c., it [394] may be remarked, seem to be considered part of the realty, and, therefore, not to fall under the rule with regard to injuries with respect to personalty. (*b*)

(*t*) Wallis v. Harrison, 5 M. & W. 142; 1 Wms. Saund. 291 m. See Addison, Torts, 3rd ed., 917.

(*u*) Lush, Practice, 3rd ed., 160.

(*v*) Addison, Torts, 3rd ed., 917.

(*x*) Bacon, Abr., Baron and Feme, K.

(*y*) 1 Roll., Abr., 347.

(*z*) Noy, 70.

(*a*) Lush, Practice, 3rd ed., 160.

(*b*) If the wife's property has, prior to the marriage, been conveyed to trust

Death.—In cases where the wife may join in suing, it would seem that on the death of the husband the right of action passes to the wife, and on the death of the wife to the husband.

RULE 88.—The husband must sue alone in respect of any injuries to personal property committed during coverture.

As all the personal property of the wife vests in the husband exclusively, he alone can sue for injuries to it. The right to sue for such injuries never having been the wife's, it remains her husband's on her death, and on his death passes to his representatives. (*c*)

ees, the husband will have no legal interest in the property, and no right to maintain an action for any injury that may be done to it. (Addison, Torts, 3rd ed., 917.)

(*c*) Non-joinder and Mis-joinder.—For the results of errors as to joinder in action by husband and wife, see Rule 32. The remarks there made apply mutatis mutandis, to actions for tort.

Bankruptcy.—Upon the bankruptcy of the husband, the trustee in bankruptcy must join with the wife in suing upon causes of action in right of the wife, which, if vested in the husband, would pass to the trustee; as for a conversion of the wife's goods before marriage, see Richbell v. Alexander, 10 C. B., N. S., 324; 30 L. J. 268, C. P.: Sherrington v. Yates, 12 M. & W. 855. See. Chapter XVII.

CHAPTER XXIII.

BANKRUPT AND TRUSTEE.

RULE 89.—The trustee (*a*) and not the bankrupt must sue for injuries to the real or personal property of the bankrupt committed before the bankruptcy.

As the object of the law (*b*) is to benefit the creditors by making all the pecuniary means and property of the bankrupt available to their payment, it has in furtherance of this object been construed largely so as to pass, not only what in strictness may be called the property and debts of the bankrupt, but also those rights of action to which he was entitled for the purpose of recovering in specie, real or personal property, or damages in respect of that which has been unlawfully diminished in value, withheld or taken from him. (*c*) This result is now directly effected by the statutory enactment which passes the bankrupt's things in action to his trustee. (*d*) If X. converts the goods of A., or injures A. by a fraudulent misrepresentation; (*e*) or by erecting a nuisance, [396] decreases the value of the land of A., and A. there-

(*a*) The trustee can certainly sue in all cases in which the assignees could sue; but it is not clear whether he can not sue in many cases in which they could not, since the bankrupt's things in action pass to the trustee under Bankruptcy Act, 1869, ss. 4, 15, 17. When, therefore, in the course of this chapter, it is laid down that, in certain cases, the trustee can not sue, the statement must be received as representing the former law, and as being of doubtful correctness under the present Act.

(*b*) See *ante*.

(*c*) Rogers v. Spence, 13 M. & W. 580, 581. Broom, Parties, 2nd ed., s. 291 a.

(*d*) Bankruptcy Act, 1869, ss. 4, 15.

(*e*) Hodgson v. Sidney, L. R. 1, Ex. 313. See, also, Hancock v. Caffyn, 8 Bing. 358; Broom, Parties, 2nd ed., s. 290.

upon becomes bankrupt, A.'s right to sue vests in the trustee. "In no case where the right of action, being of such a nature as will pass to the assignees, has accrued to the bankrupt in respect of matter before the bankruptcy, can the bankrupt sue. Even a disclaimer of the assignees will in such a case enure only for the benefit of the defendant, and not for that of the bankrupt." (*f*) If, that is to say, X. converts A.'s goods before A.'s bankruptcy, A. can not, even with the permission of his trustee, sue X. for the wrong. (*g*)

The trustee can further sue in several instances in which the bankrupt, even had he remained solvent, would have had no cause of action. (*h*)

The trustee, in the first place, owing to his title relating back to the commencement of the bankruptcy, *i. e.*, the date, speaking generally, at which the act of bankruptcy was committed, (*i*) can bring trover against any one who with knowledge of the act of bankruptcy has purchased his goods from the bankrupt. If, that is to say, A. commits an act of bankruptcy, and then sells goods to X., who knows of the act having been committed, X., though he may have paid the full price of the goods, is liable to an action of trover by A.'s trustee, who, in other words, is (subject to restrictions for a protection of bonâ fide purchasers) (*k*) able to treat the goods as his own, and like any other owner, maintain an action against a person who has bought them from a vendor who had no right [397] to sell them; (*l*) so the trustee can bring trover against a sheriff who, after notice of an act of bankruptcy, takes the bankrupt's goods in execution and sells them. (*m*)

The trustee, in the second place, becomes the owner

(*f*) 2 Griffith & Holmes, Bankruptcy, 2nd ed., 934, 935.

(*g*) See Hillary v. Morris, 5 C. & P. 6; Lea v. Telfer, 1 C. & P. 146. For the effect of the bankruptcy of a plaintiff after the commencement of an action, see *ante*.

(*h*) 2 Lindley, Partnership, 2nd ed., 1097.

(*i*) Bankruptcy Act, 1869, s. 11.

(*k*) Ibid., s. 95.

(*l*) See Chapter XXV.

(*m*) See Cooper v. Chitty, 2 Smith, L. C., 6th ed., 435, and notes.

of goods of which the bankrupt is allowed to have possession and to be reputed owner by the true owner at the commencement of the bankruptcy. (*n*) Hence, if X., their true owner, after knowledge of the commission of an act of bankruptcy, takes them away from A., whom he has suffered to be their reputed owner, A.'s trustee can sue X.

The trustee, in the third place, can, independently of the rights which he derives from the relation of his title, treat many transactions of the bankrupt's as void on the ground of fraudulent preference, and thus obtain the right to sue persons to whom the bankrupt has conveyed property. (*o*)

Exception.—Trespass to land before bankruptcy.

The trustee can not sue for a trespass to the land of the bankrupt, or for a mere seizure of the plaintiff's goods before bankruptcy. (*p*) For such trespass or mere seizure an action must be brought, if at all, by the bankrupt. It admits, however, of doubt whether the trustee can not sue for any damage which the trespass or seizure may cause to the value of the property. This exception appears to be merely an extension of the rule that the bankrupt must sue for injuries to his person or feelings. (*q*)

RULE 90.—For injuries to property acquired [398] by the bankrupt after bankruptcy, either the trustee may sue or the bankrupt may sue if the trustee does not interfere.

Trustee may sue.—The trustee may treat the property of the bankrupt as his own, and sue for any interference with his rights over it.

(*n*) Bankruptcy Act, 1869, ss. 11, 15.

(*o*) 1 Griffith & Holmes, Bankruptcy, 2nd ed., 132.

(*p*) Ibid., 302; Brewer v. Dew, 11 M. & W. 625; 12 L. J. 448, Ex. Rogers v. Spence, 13 M. & W. 571; 12 Cl. & F. 700 (Ex. Ch.); Clark v. Calvert, 8 Taunt. 742.

(*q*) See Rule 91.

Bankrupt may sue.—Though the property of a bankrupt vests in the trustee, yet after he has been adjudicated a bankrupt, and before he has obtained the order of discharge, he may acquire property in chattels which none but the trustee can defeat. (*r*) Hence, if A. becomes bankrupt, and after his bankruptcy purchases goods, his trustee has a right to take them from him, but no one else has, and A. may maintain an action of trover against any one who does so; since if the trustee suffers him to treat such after-acquired property as his own, no third person can defend himself from an action by setting up a title upon which the trustee does not think fit to insist. (*s*) But he can neither retain the property against the trustee, (*t*) nor maintain trespass for seizing his goods against any one who, after the trespass, obtains a surrender of the trustee's interest in the goods seized, since this is in fact a ratification of the seizure by the trustee, who has a right to take the goods. (*u*)

[399] RULE 91.—The bankrupt alone can sue for injuries to his person, feelings, or reputation.

"Assignees of a bankrupt are not to make profit of a man's wounded feelings; causes of action which are . . . . purely personal do not pass to the assignees, but the right to sue remains with the bankrupt." (*v*) Hence, the trustee can not sue for the seduction of the bankrupt's daughter, (*x*) for libel, (*y*) or for an assault. (*z*) The principle of this rule has received a wide extension: "Causes of action, ... arising out of a wrong, per-

(*r*) Webb v. Fox, 7 T. R. 398; Fowler v. Down, 1 B. & P. 48. See Fyson v. Chambers, 9 M. & W. 460. See 1 Griffith & Holmes, Bankruptcy, 2nd ed., 302.

(*s*) See Hancock v. Caffyn, 8 Bing. 366.

(*t*) Nias v. Adamson, 3 B. & Ald. 225.

(*u*) Hull v Pickersgill, 1 B. & B. 282; Fyson v. Chambers, 9 M. & W. 460.

(*v*) Howard v. Crowther, 8 M. & W. 604, per ABINGER, C. B.

(*x*) Ibid.

(*y*) Ibid.

(*z*) Drake v. Beckam, 11 M. & W 315.

sonal to the bankrupt, for which he would be entitled to a remedy whether his property were diminished or impaired or not, are clearly not within the letter, and have never been held to be within the spirit of the enactments [with regard to bankruptcy], even in cases where injuries of this kind may have been accompanied or followed by loss of property, and to this class . . . . the action of trespass *qu. cl. fr.*, and that of trespass to the goods of the bankrupt must be considered to belong. These rights of action are given in respect of the immediate and present violation of the possession of the bankrupt, independently of his rights of property,—they are an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in value of property may have occurred, and even where such an incident has accompanied or followed a wrong of this description, the primary personal injury to the bankrupt, being the principal and essential cause of action, still remains in him, and does not vest in the assignee either as his property or his debts." (*a*) There is a difficulty in determining the exact limits of this [400] rule. If a trespass to land or goods is to be considered in the light of a merely personal wrong, such, *e. g.*, as libel, it would seem to follow that the trustee can not bring an action for a trespass to the bankrupt's goods acquired after bankruptcy; yet the most the cases seem actually to decide is that the assignees could not sue for a mere trespass committed before bankruptcy. (*b*) It has been suggested, (*c*) that where a trespass committed before the bankruptcy occasions damage to the bankrupt's property, "it may be that the law will give an action to the bankrupt for the personal injury sustained by him, and to the [trustee] for [the] injury done to the property." (*d*) But this view, though a strict result of the

(*a*) Rogers v. Spence, 13 M. & W. 580, 581, per CURIAM; Clark v. Calvert 8 Taunt. 742; Topham v. Dent, 6 Bing. 515; Broom's Parties, 2nd ed., 291 a

(*b*) See 1 Griffith & Holmes, Bankruptcy. 2nd ed., 302.

(*c*) Ibid.

(*d*) Rogers v. Spence, 12 Cl. & Fin. 700, 720, per Lord CAMPBELL.

principle that each person must sue for the injury done to himself, is opposed to judicial dicta in a recent case. (*e*) Where a bankrupt sued an attorney, firstly, for negligence in defending an action, whereby the then defendant (the bankrupt) was charged in execution; and secondly, for negligence, whereby the plaintiff lost rents, &c., it was held that for the first cause of action the bankrupt had a right to sue because it arose out of a personal wrong, for which the party would be entitled to sue whether his property were injured or not, and which therefore did not pass to the assignees; but that for the other cause of action the plaintiff could not sue, because it arose from an injury to the property, and passed therefore to the assignees. (*f*)

A bankrupt can not maintain an action for what [401] is in reality an injury to property, by alleging an injury to his character and credit resulting therefrom. (*g*)

(*e*) See Hodgson v. Sidney, L. R. 1 Ex. 313, esp. 315, 316, judgment of BRAMWELL, B.

(*f*) Wetherell v. Julius, 19 L. J. 367, C. P.; 10 C. B. 267. The damages recovered during the continuance of the bankruptcy are, it seems, the property of the trustee. Bankruptcy Act, 1869, s. 15, cl. 3, and s. 11.

(*g*) Hodgson v. Sidney, L. R. 1 Ex. 313.

It may be worth while to call attention to the fact that the question whether a bankrupt can, in any case whatever, commence an action in his own name during the continuance of the bankruptcy is, under the present Act, at least open to doubt, since that Act transfers to the trustee the bankrupt's things in action.

See Rule 40 as to the effect of bringing an action in the name of the bankrupt when it ought to be brought in the name of the trustee, or vice versa.

CHAPTER XXIV.

EXECUTORS AND ADMINISTRATORS.

RULE 92.—The personal representatives of the deceased (*i. e.*, his executors or administrators) can sue for injuries to the property of the deceased done during his lifetime.

"It was a principle of the Common Law, that if an injury was done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done. Thus where the action was founded on any malfeasance or misfeasance, was a tort, or arose ex delicto, such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, escape, and many other cases of the like kind, where the declaration imputes a tort done either to the person or property of another, and the plea must be 'not guilty,'—the rule was actio personalis moritur cum personâ." (*a*) This principle has, as regards an executor's or administrator's right to sue for wrongs to his testator, been so far modified that what was formerly the rule may now be fairly considered the exception. But it is of importance to remember that this right to sue is an exception to the maxim of the common law, and depends almost entirely upon statutory provisions. (*b*)

Injuries to the personal property.—The right to [403] sue for injuries to the testator's or intestate's per-

(*a*) 1 Williams, Executors, 6th ed., 743.

(*b*) Not wholly, for replevin and detinue could be brought independently of statute. See 1 Williams, Executors, 6th ed., 740.

sonal estate depends upon 4 Edw. III. c. 2 (extended by 15 Edw. III c. 5).

The statute has been liberally construed, so that an executor or administrator has now the same actions for any injury done to the personal estate of the deceased during his lifetime, whereby it has become less beneficial to the executor or administrator, as the deceased himself might have had. (*c*) So the executor, &c., may bring trespass or trover, (*d*) and may bring an action against the sheriff for a false return, (*e*) and generally may sue for injuries done to the personal estate of the deceased during his lifetime. (*f*)

Injuries to real property.—The right to sue for injuries done to the real estate of the deceased in his lifetime depends on 3 & 4 Will. IV. c. 42, s. 2.

Under this statute an executor or administrator may bring an action for injuries to the real estate of the testator or intestate, provided that:

1st. The injury was committed within six calendar months before the death of the deceased;

2nd. The action is brought (*i. e.*, the writ is sued out) within a year after the death of the deceased.

Under this act, if X. diverts A.'s watercourse, obstructs his lights, trespasses on his land, or commits any other wrong of the like nature, and A. dies within six months after the commission of the wrong, A.'s executor, &c., can sue B., provided that the action be commenced within a year after A.'s death.

The restrictions imposed on actions for injuries to the real estate do not apply to actions for injuries to
[404] the personal estate. If, for example, X. converts A.'s goods, and A. dies a year after the conversion, A.'s executor can still sue X. for the tort.

(*c*) 1 Wms. Saund. 217, note 1.

(*d*) Russell's Case, 5 Coke, 27 a.

(*e*) Williams v. Cary, 4 Mod. 403; Berwick v. Andrews, 6 Mod. 126.

(*f*) 1 Williams, Executors, 6th ed., 744, 745. It appears to be a moot point whether the term "real estate," as used in the statute, includes chattels real. Compare 1 Williams, Executors, 6th ed., 748, note (*z*), with 3 & 4 Will IV., c. 42, s. 2.

RULE 93.—The personal representatives of the deceased can not sue for injuries to the person, feelings, or reputation of the deceased. (*g*) [1]

The rule that an action for a personal wrong (*h*) dies

(*g*) Compare Rule 91.

(*h*) Provided, of course, that the assault does not cause A.'s death, and thus fall within the exception afterwards mentioned. It may be well to notice that there is no legal remedy for a libel on a deceased person.

[1] An exception to this rule seems to be noticed in Morgan's Law of Literature, vol. 1, p. 174. "In considering libels on the dead," says the author, "not only the living, but the dead, can be subjects of libel. Although the person defamed be dead, the libel is, nevertheless, punishable; for it stirs up others of the same family, blood, or society, to revenge and to break the peace. The chief cause for which the law so severely punishes all libels is, says Hawkins, the direct tendency of them to a breach of public peace by provoking the parties injured and their friends and families to acts of revenge which it would be impossible to restrain by the severest laws were there no redress from public justice for injuries of this kind, which of all others are most sensibly felt. And so histories, biographies, or memoirs, published at long intervals after the death of their subjects, might be so scandalous and prurient as to be actionable; but in such cases the intent to libel must be proved. In the case, however, of libels on the dead, the intention of the person publishing must be shown to have been malevolent; for to say that the conduct of a dead person can at no time be canvassed—to hold that, even after ages are passed, the conduct of bad men can not be contrasted with the good—would, in the words of Lord KENYON, be to exclude the most useful part of history; 'and, therefore,' said that learned judge, 'it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, as in Rex v. Critchley, then it comes within the rule stated by Hawkins; then it is done with a design to break the peace, and then it becomes illegal.' This, however, may be upon the ground above mentioned, namely, that it stirs up strife and tends to a breach of the peace."

with the person, still applies to those wrongs which are of a strictly personal character. (*i*)

Exception.—Actions where deceased killed by negligence.

Under 9 & 10 Vict. c. 93, an action is maintainable against any person who causes the death of another by his wrongful act, neglect, or default, provided that the wrongful act would, if the person injured had not died, have entitled him to maintain an action for the injury. This action depends wholly upon statute, and being instituted for the purpose of enabling persons who have suffered pecuniary damage by the death of a relation, *e. g.*, a parent, to obtain compensation for the wrong-doer—for example, the railway company by whose default or negligence his death was caused—is in several respects peculiar.

1st. The cause of action is not, strictly speaking, the death of the person killed, *e. g.*, the railway passenger, but the injury to him. The result is that if A. is injured in a railway accident, and afterwards accepts from the company a sum of money in satisfaction of the injury done to him, and then dies in consequence of the bodily [405] injury which he has received, no action can be brought against the company by his representatives. (*k*) "The intention of the statute is not to make the wrong-doer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim, actio personalis moritur cum personâ would have applied. It only points to a case where the party injured has not recovered compensation against the wrong-doer." (*l*) Yet the damages to be recovered are estimated with reference, not to the damages which the deceased could have recovered if he

(*i*) See Broom, Maxims, 4th ed., 876.

(*k*) Read v. Great Eastern Rail. Co., L. R. 3, Q. B. 555; 37 L. J. 278, Q. B.

(*l*) Ibid., 557, per LUSH, J.; but compare Pym v. Great Northern Rail. Co., 4 B. & S. 396; 32 L. J. 377, Q. B. (Ex. Ch.).

had lived, but to the loss inflicted upon the persons, *e. g.*, his children, for whose benefit the action is brought.

2ndly. The action must be brought by or in the name of the executor or the administrator of the deceased, (*m*) for the benefit of certain persons, viz., a wife, husband, parent, or child; (*n*) or if it is not brought by such executor or administrator within six months, then in the name of the persons beneficially interested in the result. (*o*)

3rdly. It must be brought within twelve calendar months after the death of the deceased.

4thly. Not more than one action can be brought with respect to the same subject-matter of complaint. (*p*)

5thly. The plaintiff on the record must deliver a full particular of the person or persons for whom or on whose behalf the action is brought, and of the nature of the claim. (*q*)

6thly. The amount recovered is divided among the parties on whose behalf the action is brought, [406] in such shares as the jury may direct. (*r*) [1]

7thly. The action is maintainable although the death of the deceased has been caused under such circumstances as amount in law to felony. (*s*)

RULE 94.—The personal representatives of the deceased can sue for injuries to his personal property committed after his death.

(*m*) 9 & 10 Vict. c. 93, s. 2.

(*n*) *I. e.*, legitimate child (Dickinson v. North-Eastern Rail. Co., 2 H. & C. 735; 33 L. J. 91, Ex.) See 9 & 10 Vict. c. 93, s. 5, for the interpretation given to the words "parent," &c.

(*o*) 27 & 28 Vict. c. 95, s. 1.

(*p*) 9 & 10 Vict. c. 93, s. 3.

(*q*) Ibid., s. 4.

(*r*) 9 & 10 Vict. c. 93, s. 2.

(*s*) Ibid., s. 1.

[1] The statutes of several of the states give the right to bring such actions.

Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels, the executor or administrator may bring an action for damages for the tort, and under such circumstances he has his choice, either to sue in his representative character, and declare as executor or administrator, or to bring the action in his own name and in his individual character. (*t*) The ground of this choice is, that on the death of the testator or intestate, his executors or administrators are in point of law the owners of the goods which belonged to him, and consequently, whether in actual possession of them or not, may declare, as any other person may, for interferences with their rights over their own property. Hence, an executor or administrator may maintain trespass or trover for taking away the goods of the deceased after his death, whether the executor, &c., have ever been in actual possession of the goods or not, for the property draws to it, as it is said, the possession. (*u*) It is scarcely necessary to add that an executor does not inherit greater rights than those possessed by the testator. If, for example, the testator's goods are in the hands of X., who
[407] has a lien upon them, the executor can not bring trover against X. as long as the lien lasts. Though all the personal estate of the testator or intestate passes to his representatives, the right to bring actions for injuries to it after his death is to some extent affected by the nature of the property.

All the movable goods, though in ever so many different and distant places, vest in the executor in possession immediately on the testator's death. (*v*) Hence, for an injury to them, *e. g.*, a conversion, an executor can sue, as already pointed out, the moment it is committed. So, again, the reversion of a term which the testator has granted for a part of the term (as *e. g.*, where A., the testator, is lessee of land for ninety-nine years and has leased it for twenty-one years to B.), is in the executor

(*t*) 1 Williams, Executors, 6th ed., 820, 822.
(*u*) See *ante*.
(*v*) 2 Wms. Saund. 47 *b*, note 1; 1 Williams, Executors, 6th ed., 600.

immediately by the death of the testator, (*w*) and, therefore, the executor can immediately bring an action for any act injurious to his reversionary interest.

But things immovable, such as leases for years of land or houses, are not considered to be in the possession of the executor or administrator before entry. And since, as before pointed out, the right to bring an action for trespass to land depends, not upon the right to possession, but upon possession, (*x*) an executor or administrator can not sue a person who, after the testator's death, trespasses on his property, until he has entered.

The executor or administrator may after entry bring an action for trespasses committed before entry. (*y*)

Relation of title.—An executor's title, depends, as already pointed out, (*z*) upon the will; an administrator's upon the letters of administration. Hence, an executor can commence an action before he takes out probate, for an injury to the personal property of the deceased, whilst an administrator can not do so until the [408] administration has been granted to him. It might, therefore, be supposed to follow, that if, after the death of A., the testator, and before letters of administration are taken out, X. converts his goods, the administrator could not sue X. in trover. But this consequence is avoided by the doctrine that for some purposes an administrator's title relates back to the death of the intestate. Hence, an administrator may have an action of trespass, (*a*) or trover, for the goods of the intestate taken by a wrong-doer before letters of administration were granted. So it would seem that the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property, for all matters affecting the same, subsequent to the death of the intestate.

(*w*) Ibid., 600, 601; Trattle v. King, T. Jones, 170.

(*x*) See *ante*.

(*y*) See Barnett v. Guildford, 11 Exch. 19; 24 L. J. 281. Ex.; Radcliffe v. Anderson, E. B. & E. 806; 29 L. J. 128, Q. B.

(*z*) See *ante*.

(*a*) Tharph v. Stallwood, 5 M. & G. 760; 12 L. J. 241 C. P

In other words, the letters of administration, when g. anted, give an administrator, speaking generally, the same rights of suing wrong-doers as are possessed by an executor. (*b*)

RULE 95.—The real representative of the deceased can not sue for any wrong done to him.

The right to sue passes, if it passes at all, to a deceased person's personal, and not to his real representatives; nor can the latter sue for injury done to his property after death. When an heir sues for an injury to the real estate, which he inherits, he does not sue for any injury to the testator's property, but for an interference with his own rights as owner.

One apparent exception to this general principle is the following:

[409] The heir-at-law is the proper person to maintain an action for the entire damage resulting from a nuisance of a continuing nature, which comes into his possession by descent. (*c*)

(*b*) An administrator, nevertheless, can not bring detinue against a person who, having got goods of the intestate's, has ceased to hold them prior to the grant of administration. Crossfield v. Such, 8 Exch. 825; 22 L. J. 325, Ex.

(*c*) Penruddock's Case, 5 Coke, 101 a.; Some v. Barwish, Cro. Jac. 231. See Addison, Torts, 3rd ed., 920. As to joinder of plaintiffs, see *ante*. As to the right of action for a tort passing to the survivor of several persons jointly injured, see *ante*.

CHAPTER XXV.

DEFENDANTS—GENERAL RULES.

RULE 96.—No person is liable to be sued for any injury of which he is not the cause.

No one, it is clear, can be held responsible for anything which is not the result of his own acts or omissions. But the conduct of X. may occasion injury to A., and therefore, in one sense, be the cause of a wrong to A., and yet X. may not be held responsible for the wrong, either because it is only a remote consequence of X.'s conduct; or, under some circumstances, because the damage complained of is due in part to what is termed the contributory negligence of A. In either case the ground on which X. is exempt from liability is that he is not, in the eye of the law, the cause of the grievance complained of by A.

Remoteness.—A person is not the cause of or liable for the remote or indirect results of his acts. "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking at any further degree." (*a*) A person, that is to say, is responsible only for the natural and proximate consequences of his acts, and not for remote consequences not clearly connected with the act complained of. (*b*)

(*a*) Bacon, Maxims, Reg. 1. See Broom, Maxims, 4th ed., 215.

(*b*) See Vicars v. Wilcocks, 8 East, 1; 2 Smith, L. C. 6th ed., 487; Ward v. Weeks, 7 Bing. 211; Ashley v. Harrison, 1 Esp. 48; Taylor v. Neri, Id. 386; and contra for cases where damage was not too remote; Lumley v. Gye, 2 E. & B. 216; 23 L. J. 112, Q. B.; R. v. Moone, 3 B. & A. 184; R. v. Carlile, 6 C & P. 636

[411] The question of what is called remoteness, *i. e.*, whether the wrong complained of can be connected with the conduct of the defendant closely enough to make him liable for it, must, it is manifest, mainly arise when the injury complained of is not some act such as a trespass, which is actionable in itself, (*c*) but some act, *e. g.*, the utterance of a slander, which becomes an injury on account of the damage which it causes; since, in such a case, it is necessary to show that the damage fairly results from the conduct of the defendant. In an action, for example, for slander, the damage must be the legal and natural result of the words spoken, and A. can not support an action for slander against X. on account of a mere wrongful act, such as a breach of contract by M., which was prompted by, or resulted from, the statement uttered by X. (*d*) Thus again, where the director of a musical performance sued the defendant for libeling a public singer, whereby she was prevented from performing in public, and the plaintiff lost his profits, the damage was held to be too remote to enable him to sue. (*e*)

The principle that a person is not liable for results which do not flow naturally from his acts must be applied with great caution. The expression, indeed, "remoteness" is calculated to mislead, since a man may be held the cause of, and liable for, damage which may be a very remote consequence of his conduct, provided there be no intermediate cause to which it can be more properly referred. The true bearing and effect of the principle under consideration is most easily explained in reference to the rule, that any person is liable to be sued who causes injury to another. (*f*)

[412] *Contributory negligence.* (*g*)—A person is not

(*c*) See *ante*.

(*d*) Vicars v. Wilcocks, 2 Smith, L. C., 6th ed., 487; Lynch v. Knight, 9 H. L. C. 577.

(*e*) Ashley v. Harrison, 1 Esp. 48; Taylor v. Neri, 1 Esp. 386. But see Lumley v. Gye, 2 E. & B. 216; 23 L. J. 462, Q. B.

(*f*) Rule 97.

(*g*) The doctrine of contributory negligence may, perhaps, be in strictness considered a result of the principle, that a person is not liable for the remote consequences of his acts.

liable for damage caused partly through his negligence and partly through the negligence of the party injured.

X., through his negligent driving, runs against A., and breaks A.'s leg; A., however, is himself driving negligently, and through his negligence contributes to the calamity. A. can not recover damages from X., nor, under the supposed circumstances, had X. been injured, could he have recovered damages from A. "The rule of law is, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. If, by ordinary care, he might have avoided them, he is the author of his own wrong." (*h*) "The question is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff so far contributed to the misfortune by his own negligence and want of care or caution, that but for such negligence or want of ordinary care on his part the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter he would not, as but for his own fault the misfortune would not have happened. Mere negligence, or ordinary want of care or caution, would not disentitle him to recover, unless it were such that but for that negligence and want of ordinary care and caution the misfortune could not have happened; nor if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff." (*i*) The contributory negligence of the plaintiff must, in order to free the defendant from liability, distinctly form part of the cause of the damage; *i. e.*, be one of the cir- [413] cumstances without which it could not have been inflicted. (*k*)

(*h*) Davies v. Mann, 10 M. & W. 549, per PARKE, B.

(*i*) Tuff v. Warman, 27 L. J. 322, C. P. (Ex. Ch.), judgment of Ex. Ch.

(*k*) Greenland v. Chaplin, 19 L. J. 293, 294, Ex., judgment of POLLOCK C. B.

The contributory negligence or wrong of a third party is no defense; (*l*) for no one can rid himself of liability for a tort merely by showing that some one else is also liable, (*m*) *i. e.*, if the negligence of X. damages A., he can not set up in answer to A.'s claim for compensation, that the negligence of Y. contributed to the accident. Thus, where the joint negligence of two persons separately employed by the plaintiff caused an explosion which damaged his shop, it was held that he could recover against one of the parties, and that the negligence of the other could not be a defense to the action. (*n*) "If a man sustain an injury from the separate negligence of two persons, employed upon his premises to do separate things, . . . as in this case, the plaintiff has sustained an injury from the negligence of the gas-fitters' servant on the one hand, and of the gas company on the other, he can, in my opinion, maintain an action against both or either of the wrong-doers." (*o*)

RULE 97.—Any person who causes an injury to another is liable to be sued by the person injured.

Every person who is the cause of an injury to another's person, reputation, or property is liable to an action, (*p*) and no one is liable to be sued for any wrong of which he is not the cause. (*q*) In determining, therefore, [414] whether a given person is liable to be sued for a wrong, of whatever description, the point to be considered is, whether he be or not, in the eye of the law, the cause of the injury complained of, to the person, reputation, or property of the plaintiff.

Injuries to person.—If X. assaults or imprisons A., or

(*l*) Bullen, Pleadings, 3rd ed., 753; Harrison v. Great Northern Rail. Co., 3 H. & C. 231, 33 L. J. 266, Ex.

(*m*) See Rule 98.

(*n*) Burrows v. March Gas Co., L. R. 5, Ex. 67.

(*o*) Ibid., 71, judgment of KELLY, C. B.

(*p*) Bacon, Abr., Action, B.

(*q*) Selwyn, N. P., 13th ed., 42. See Rule 96.

otherwise directly interferes with the liberty of A., there can be (supposing the circumstances of the case are known) little or no difficulty in fixing upon X. as the cause of, and therefore liable for, the wrong. X., moreover, may be directly liable for an act of which, in one sense, he is only the remote cause. X. threw a squib at M., who, to get rid of it, tossed it to N., and after the squib had been tossed from one person to another, it at last fell upon and injured A. It was held, (*r*) that A. could sue X. in trespass, though that action can be brought only for direct injury, for the "intermediate acts of [the other persons did] not purge the immediate tort in the defendant. He who does the first wrong is answerable for all the consequential damages." (*s*) "I look," says GREY, C. J., "upon all that was done subsequently to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting, and I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower." (*t*) So where the defendant had a quarrel with a boy in the street, and pursued him with a pickaxe, and the boy ran for safety into a wine-shop, and upset a cask of wine, it was held (by an American court), that the pursuer of the boy was responsible in damages for the loss of the wine. (*u*) Where, however, the injury to A.'s person arises from the negligence of X., the question may, as already pointed out, arise, whether A.'s own negligence has not contributed to the result, since, if it has done so, X. [415] is not the cause of the damage to A., and is not liable to be sued for it. (*x*)

Injuries to character.—1. *Libel.*—Every person who publishes, *i. e.*, makes public, a libel, may be sued. The

(*r*) Scott v. Shepherd, 1 Smith, L. C., 6th ed., 417.

(*s*) Ibid., 418, 419, judgment of NARES, J.

(*t*) Ibid., 423, 424, judgment of DE GREY, C. J.

(*u*) Vandenburgh v. Truax, 4 Denio, (U. S.) R., 464.

(*x*) It is hardly necessary to remark that the defense of contributory negligence may arise when the injury is one, not to the person, but to the property of the plaintiff. As to false imprisonment, see *post.*

person, therefore, who makes a defamatory statement, and authorizes its publication in writing, (*y*) the person who writes, the publisher who brings out for sale, the printer who prints, the vendor who distributes, a libel, are each guilty of publication, and may each be sued, (*z*) the gist of the offense being the making public, not the writing of the libel; the person who having read a libel sends it on to a friend, is a libelor; (*a*) and it would seem that a person who reads aloud a libel, knowing it to be such, may be sued. (*b*)

2. *Slander.* (*c*)—The original utterer, and the repeater of a slander, are each of them slanderers, and liable to be sued for the slander. (*d*)

If the slander consists of words actionable in themselves, as where X. asserts of A. that he has committed a murder, X., who originally makes the assertion, and Y. who repeats it, stand exactly in the same position as regards liability to be sued. They have each, in other words, uttered a separate slander, for which they are each liable to an action; and Y. is liable even should he have repeated the slander merely as a rumor. (*e*) If the slander consist of words not actionable in themselves, but actionable only because they cause damage (as where X. [416] says of A. that he is a blackguard, unfit for the society of gentlemen, and so forth), then, indeed, each person who utters the slander and causes damage by the utterance of it is liable to an action. But as it is essential, in order to fix the defendant with liability, to show that the slander uttered by him has caused damage to the plaintiff, there may be a considerable difference between the liability of the utterer and of the repeater of the slander, since it may not be possible to connect the damage with the original utterance of the defamatory statement.

(*y*) Parkes v. Prescott, L. R. 4, Ex. 169 (Ex. Ch.).
(*z*) Bacon, Abr., Libel, B. 1, 2.
(*a*) Coxhead v. Richards, 2 C. B. 569; 15 L. J. 278, C. P.
(*b*) Bacon, Abr., Libel, B. 1, 2.
(*c*) See *ante*.
(*d*) Watkin v. Hall, L. R. 3, Q. B. 396.
(*e*) Ibid.

A person who utters or repeats a slander is not in general to be considered the cause of, and therefore liable for damage, which is merely the result of its further repetition by others. "Every man must be answerable for the necessary consequences of his own wrongful acts; but . . . a spontaneous and unauthorized communication can not be considered as the necessary consequence of the original uttering of the words. (*f*) Where one man makes a statement to another, who repeats it to a third, I do not think it reasonable to hold the first speaker responsible for the ultimate consequences of his speech. If I make a statement to a man, I know the consequences of making it to him when I make it; but if I do not desire, and do not authorize, the man to whom I make it to repeat it, but he does it, am I to be liable for the consequences of his so doing." (*g*) X. said to M. that A. was a swindler. Damage ensued to A. in consequence of the repetition of these words by M. It was held, that A. could not sue X. (*h*) An action was brought by A. and B., a husband and wife, against X., and Y., his wife. The words declared upon were addressed by Y. to B. in the presence of other persons, but in the absence of A. They were repeated without the authority of Y. by B. to A., her husband. A., [417] in consequence of the imputation contained in the slander, refused to cohabit with B. It was held, that the defendants were not liable for the unauthorized repetition of the slander by B. to A., her husband. (*i*) The speaker of a defamatory statement is not answerable for damage caused by the wrongful or illegal act of a third party, though this act may be committed in consequence of the slander. If, that is to say, X. makes a slanderous statement about A., and M., in consequence, assaults A., or breaks a contract he has entered into with A., the assault or breach of contract will not be held to be caused by the

(*f*) Ward v. Weeks, 7 Bing. 215, per CURIAM; Parkins v. Scott, 31 L. J. 334, Ex., judgment of POLLOCK, C. B.

(*g*) Parkins v. Scott, 31 L. J. 334, Ex., judgment of BRAMWELL, B.

(*h*) Ward v. Weeks, 7 Bing. 211.

(*i*) Parkins v. Scott, 1 H. & C. 153; 31 L. J. 331, Ex

slander uttered by X. (*k*) A person who utters a slander is, however, in many cases responsible for the results of its repetition by another. He is so, for example, "if the utterer should have authorized its repetition." (*l*)

The result is, that though the utterer and the repeater of a slanderous statement are each independently liable to be sued, yet when, for the maintenance of an action, it is requisite to prove that damage was caused to the plaintiff by the words complained of, it is in general easier to fix the repeater than the utterer of the slander with liability for the damage. (*m*)

Injuries to property.—1. *Real property, or land.*—When the act complained of is a trespass, (*n*) there can in general be little difficulty in determining who is the wrong-doer. (*o*)

[418] When the wrong complained of is an act which is injurious, because of the damage caused thereby, there may no doubt arise a question, as in other cases, whether the damage was caused by the act or omission of the defendant. He may, however, be responsible for damage for which he would not generally be perhaps considered the immediate cause. X. and Y., the defendants, who were drainage commissioners, were empowered to construct a cut with proper walls, &c., to keep out the waters of a tidal river, and also a culvert under the cut to carry off the drainage from the lands on the east, to the west of the cut, and were to keep the same at all times open. In consequence of the negligent construction of the gates, &c., the river flowed into the cut, and bursting its western bank, flooded the adjoining lands. The plaintiff, and other owners of land on the east side of the cut, closed the lower end of the culvert, and prevented

(*k*) Taylor v. Neri, 1 Esp. 386; Vicars v. Wilcocks, 2 Smith, L. C., 6th ed, 487, 489; but compare Lynch v. Knight, 9 H. L. C. 577.

(*l*) Parkins v. Scott, 31 L. J. 334, Ex., per POLLOCK, C. B.

(*m*) It is moreover possible that one of the parties may have uttered the slander under circumstances which made it a privileged communication, whilst the other may not be able to show that he is protected by any privilege. See Watkin v. Hall, L. R. 3, Q. B. 396; 37 L. J. 125, Q. B.

(*n*) See *ante*.

(*o*) As to the liability of all persons who join in a trespass, see Rule 91.

the waters from overflowing their lands to any considerable extent; but the occupiers of the land on the west side re-opened it, and so let the waters through on to the plaintiff's land to a much greater extent. It was held that the commissioners were responsible for the entire damage thus caused to the plaintiff's land. (*r*)

2. *Personal property, or goods.* (*s*)—Any person who interferes with another's right to the possession of goods is liable to an action. If his interference does not amount to a deprivation of the rightful possessor's possession of the goods; if it is a mere taking of the goods from one place to another, the wrong-doer is guilty merely of a trespass. (*t*) If, for example, a man who has no right to meddle with goods, removes them from one place to another, an action may be maintained against him for the trespass: but he is not guilty of a conversion of them unless he removes the goods for the purpose of taking them away from the plaintiff, or of exercising some dominion or control over them for the benefit of himself or some other person. (*u*) But if the wrong-doer keeps the goods of another person out of his hands, or sells, destroys, or pawns them, or, in short, claims to treat them in any way inconsistent with that other person's right to immediate possession, he is guilty of a conversion, and liable to an action of trover or detinue. (*x*) [419]

Trover. (*y*)—As a conversion is an act actionable in itself, there is no need to consider, in determining who ought to be sued for it whether or not it has produced actual damage. But two points require notice.

(*r*) Collins v. Middle Level Commissioners, L. R. 4, C. P. 279. See further as to a defendant's liability for a nuisance, *post.*

(*s*) See *ante.*

(*t*) See Burroughes v. Bayne, 29 L. J. 187, Ex., judgment of MARTIN, B.

(*u*) Addison, Torts, 3rd ed., 309; Falke v. Fletcher, 34 L. J. 146, C. P.; Fouldes v. Willoughby, M. & W. 551.

(*x*) Wilbraham v. Snow, 2 Wms. Saund. 47 k. The gist of trover is the conversion; the gist of detinue is the wrongful detainer of goods; trover is brought to recover damages for the conversion of the goods, whereas the object of detinue is to recover possession of the goods themselves. The distinction between the two (as to which, see Burroughes v. Bayne, 5 H. & N. 296; 29 L. J. 285, Ex.) is of little importance for the present purpose.

(*y*) See *ante.*

1st. It may be hard to settle whether a given act amounts to a conversion, *i. e.*, to a denial of the plaintiff's right to possess the goods. A. let a billiard-table to M., who assigned the goods in his house, and amongst them the billiard-table, by a bill of sale to X. X. took possession, but did not remove the table. A. demanded the table. X. desired to see the writing by which it was let to M. Some negotiation took place as to this, and ultimately X.'s servant would not give up the table to A. when A. called for it, though X. had directed him to do so. The table was afterwards seized by M.'s landlord for rent, and A. brought an action of trover against X. (*z*) The majority of the court held, that there was evidence of a conversion of the billiard-table by X., but BRAMWELL, B., thought that there was not "an assertion of dominion inconsistent with the title of the plaintiff; that the [420] whole affair was matter of discussion up to the time the plaintiff was informed the goods were at his service, and that so far as the defendant was concerned there clearly was no conversion." (*a*) X., a wharfinger, held wine of A.'s. Under a mistaken view as to the legal effect of an attachment, he refused to give up the wine to A. on demand, and asked for time for inquiry. A. sued X. in trover. The majority of the Court of Exchequer thought that there was, and BRAMWELL, B., that there was not, a conversion. (*b*) The criterion of the existence of a conversion is whether the wrong-doer assumes to himself the right of disposing of another's goods. But what acts amount to such an assumption may often be a matter of dispute, and acts which would be a conversion if done by one person need not be so if done by another. Thus if X. takes and sells the goods of A., or keeps them from him, A. may treat him as a wrong-doer without any request to return the goods; but "it is a common learning that where the goods come into the defendant's possession by delivery or finding, the plaintiff must demand

(*z*) Burroughes v. Bayne, 5 H. & N. 296; 29 L. J. 185, Ex.
(*a*) Burroughes v. Bayne, 5 H. & N. 311, judgment of BRAMWELL, B.
(*b*) Pillot v. Wilkinson, 32 L. J. 201, Ex.; 2 H & C. 72.

them, and the defendant refuse to deliver them up, in order to constitute a conversion. (*c*)

2ndly. As every one who interferes with another man's right to the possession of his goods is guilty of conversion; and as no man can, as a general rule, give to another a better title to goods than he possesses himself, (*d*) a series of persons may each be guilty of successive acts of conversion of the same goods, and each therefore be liable to an action of trover by the owner. X., for example, takes the goods of A., and Y. takes them from X. A. can sue either X. or Y. So if X. takes and sells the goods of A. to Y., and Y. sells them to Z., A. may sue X., Y., or Z., (*e*) "for a man is guilty of a conversion who takes my property from another who has no [421] authority to dispose of it, for what is that but assisting that other in carrying his wrongful act into effect." (*f*) So, again, if goods are bailed to one man and he wrongfully sells them to another, (*g*) an action lies not only against the bailee, but also against a bonâ fide purchaser; (*h*) and the owner can sue an auctioneer, (*i*) or a pawnbroker, (*j*) who receives goods from a person who has no title to them, and sells them or refuses to give them up to the owner.

Indirect injuries.—Though most of the wrongs referred to in this chapter have been acts, such as trespass, the publication of a libel, conversion, &c., which are actionable in themselves, a person may, it should be remarked, be injured in different ways, *e. g.*, as well in person as in property, by acts, such as negligence or fraud, which are

(*c*) Wilbraham v. Snow, 2 Wms. Saund. 47 i. So an act which would be conversion in a master need not be so in his servant. See Chapter XVI.

(*d*) See, as to this rule and the exceptions to it, Benjamin, Sale, 4–16.

(*e*) Cooper v. Willomatt, 1 C. B. 672; 14 L. J. 219, C. P.

(*f*) McCombie v. Davies, 7 East, 5.

(*g*) See, as to the question how far a sale in all cases determines a bailment, *ante*.

(*h*) Cooper v. Willomatt, 1 C. B. 672; 14 L. J. 219, C. P.; Hardman v Booth, 1 H. & C. 803; 32 L. J. 105, Ex.

(*i*) Grimshaw v. Atwell, 8 C. & P. 6.

(*j*) Packer v. Gillies, 2 Camp. 336. Compare Donald v. Suckling, L. R. 1 Q. B. 585.

actionable only because of the damage which they cause. In considering whether a given person can be sued, the points to be weighed are, first, whether the damage complained of be not mere damage without injury; (*k*) and, secondly, whether the defendant be so connected with the damage that he may be considered its cause.

A person is the cause, not only of his own direct acts and of the wrongs immediately arising from them, but also of wrongs which can be considered to be ultimately, and in the natural course of things, the effect of his conduct. A man, therefore, is the cause of injuries arising from the mode in which he uses land or goods. [422] Hence a person's liability for nuisances maintained on land, or for damage inflicted on others by his goods.

Nuisance on land.—Every person who creates or continues a nuisance, causes it, and is therefore liable to be sued by any person specially injured thereby. (*l*)

The person who creates a nuisance is liable, even though the land on which he created it does not belong to him, and he could not remove the nuisance without a trespass. (*m*) The defendants, X. and Y., erected a building on land which was not their own, but that of the corporation of K——, of which they were members. The building was a nuisance to A.'s market, by excluding the public from part of the space on which the market was lawfully held. It was decided that A. might maintain an action for the continuing nuisance against X. and Y. "It was argued," said the court, "that the plaintiff might maintain an action against the corporation who received the rents of the building, or the tenants who occupy, as appears by the case of Ripon v. Bowles, (*n*) but that case shows that he is not bound to pursue that remedy, but

(*k*) Actions for fraud and actions for malicious prosecution afford good examples of actions for indirect injuries, and of the sort of questions to which such actions give rise.

(*l*) 2 Selwyn, N. P., 13th ed., 1082–1084; Addison, Torts, 3rd ed., 159, 160; Penruddock's Case, 5 Coke, 101 a.

(*m*) Thompson v. Gibson, 7 M.& W. 456.

(*n*) Cro. Jac. 373.

may sue the original wrong-doer. It was also said that the defendants could not now remove the nuisance themselves without being guilty of a trespass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong: and they can not be permitted to excuse themselves from paying damages for the injury it causes, by showing their inability to remove it without exposing themselves to another action." (*o*)

A landlord is responsible for a nuisance of a permanent character on the land in the occupation of a tenant from year to year, if after the creation of the nuisance, and before the damage caused, he might have put an end to the tenancy, and did not, the ground of this liability [423] being that permission to the same tenant to remain in possession, is analogous to a re-letting; and it is no defense that the landlord had no knowledge of the existence of the nuisance. (*p*) Nor does the length of the tenancy seem to make any difference in the landlord's liability, provided he had an opportunity of putting an end to it after the creation of the nuisance, and before the damage, (*q*) for the cases show "that if the wrong causing the damage arises from the non-feasance or the misfeasance of the lessor, the party suffering the damage from the wrong may sue him." (*r*) The principle is, that a party suffering damage from a nuisance has the option of suing either the lessee or the lessor. (*s*)

A person, further, who sells his interest in land, after erecting a nuisance on it, remains liable for the continuance of the nuisance, and can not relieve himself from liability by the sale; (*t*) so, also, the purchaser of land

(*o*) Thompson v. Gibson, 7 M. & W. 456, 462, per CURIAM.

(*p*) Gandy v. Jubber, 33 L. J. 151, Q. B.; 5 B. & S 78, 486.

(*q*) Todd v. Flight, 9 C. B., N. S., 377; 30 L. J. 21, C. P.; 2 Selwyn, N. P., 13th ed., 1083.

(*r*) Todd v. Flight, 30 L. J. 24, C. P., per CURIAM.

(*s*) Ibid.; Payne v. Rogers, 2 H. Bl. 350; Rosewell v. Prior, 12 Mod. 396; R. v. Pedley, 1 A. & E. 824. See, however, Saxby v. Manchester Rail. Co., L. R. 4, C. P. 198.

(*t*) Rosewell v. Prior, 12 Mod. 396. Compare Penruddock's Case, 5 Coke, 101 a.

with a nuisance on it, is liable for the nuisance after a request made to him to remove it. (*u*) "A landowner who creates a nuisance upon his land, or purchases land with an existing nuisance upon it, can not, by granting or conveying the land to another, get rid of the responsibility on the ground that he has no longer any control over the nuisance. Before his assignment over, he was liable for all consequential damages; and it is not in his power to discharge himself by granting it over, more especially where he grants it over, reserving rent, whereby
[424] he agrees with the grantee that the nuisance should continue, and has the rent for the same." (*x*)

The tenant, again, or occupier, who creates a nuisance, or suffers it to remain, is responsible for it to the persons injured thereby. (*z*)

The ground of liability is in each case the same, viz., that the landlord, tenant, or occupier is considered the cause of the nuisance; and even the owner of land is not responsible for a nuisance thereon, not occasioned by his acts or omissions. X., for example, lets premises to Y., which are not in themselves a nuisance, but which may be used by the tenant so as to become so, and the landlord derives the same benefit from them in whatever way they are used; X. is not responsible for the acts of the tenant. (*a*) In a case of this sort, where the plaintiff was damaged by smoke from fires lighted by the tenant, it was said by the Court:—"It appears to us that if a landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord can not be made responsible for the acts of the tenant." (*b*)

(*u*) Penruddock's Case, 5 Coke, 101 a; Addison, Torts, 3rd ed., 159.

(*x*) Rosewell v. Prior, 12 Mod. 396, per CURIAM; Thompson v. Gibson, 7 M. & W. 462, cited, Addison, Torts, 3rd ed, 159, 160.

(*z*) Todd v. Flight, 9 C. B., N. S., 377; 30 L. J. 21, C. P., compared with Saxby v. Manchester Rail. Co., L. R. 4, C. P. 198.

(*a*) Rich v. Basterfield, 4 C. B. 783; 16 L. J. 273, C. P.

(*b*) Ibid., 4 C. B. 800, 801, 804, 806, per CURIAM.

X. & Y. owned the soil of a stream which supplied water to two print-works. M., whilst occupier of both works, erected a weir across the stream, and thereby diverted the water from one of the works. A., becoming lessee of the last-mentioned work, and entitled to the water of the stream, removed the weir. M., afterwards, and without any authority from the defendants, and against their will, replaced it. It was held, that X. & Y., though owners of the soil, were not responsible for [425] the continuance of the nuisance. (*c*)

Damage from goods.—A person is the cause of, and therefore liable for, injuries to others arising from his goods and chattels as long as they remain under his control, (*d*) but not when they pass out of his control, unless he loses control of them by his fault. (*e*) Where, therefore, a ship is sunk, or an anchor is washed away by the tide, the owners are not bound at common law independently of special statutory provisions to remove the wreck or anchor, or responsible for the damage caused by them. (*f*)

An owner is therefore liable for injuries done by his animals; for by keeping an animal, known to be dangerous, he causes the injury, and his liability depends, not on negligence, but on the fact that he keeps or harbors an animal known to be dangerous. (*g*) Knowledge is essential; (*h*) but while knowledge may be assumed in the case of animals of a fierce nature, it must be proved in animals of a mild nature, *e. g.*, a horse. Thus, where X. let his horse stray into a road, and A., a child, was kicked

(*c*) Saxby v. Manchester Rail. Co., L. R. 4, C. P. 198, 203, 204. See, further, as to the general liability of the owner of land for damage caused to others by the use of it, Fletcher v. Rylans, L. R. 1, Ex. 265, 279; Jones v. Festiniog Rail. Co., L. R. 3, Q. B. 736, judgment of BLACKBURN, J.

(*d*) Brown v Mallett, 5 C. B. 599; 17 L. J. 227, C. B.; R. v. Watts, 2 Esp. 675.

(*e*) Hancock v. York, Newcastle, and Berwick Rail. Co., 10 C. B. 348. Compare White v. Crisp, 11 Exch. 312; 23 L. J. 317, Ex.

(*f*) Brown v. Mallett, 5 C. B. 599; 17 L. J. 227, C. P.; R. v. Watts, 2 Esp. 675; Bartlett v. Baker, 3 H. & C. 152; 34 L. J. 8, Ex.

(*g*) Rylands v. Fletcher, L. R. 3, H. L. 830; Judge v. Cox, 1 Stark, 285; May v. Burdett, 9 Q. B. 101; 16 L. J. 64, Q. B.

(*h*) Cox v. Burbidge, 13 C. B., N. S., 830; 32 L. J. 89, C. P.

and injured by it, it was held that A. could not sue X. "The owner of a horse is bound to know, and must be in all cases taken to know, that a horse is by nature likely to stray if not carefully confined, and to walk into a pasture and consume the grass. For this, therefore, the [426] owner is held to be liable. But if a horse does an act which is not in the ordinary course of the nature of a horse to do, and which no owner would, therefore, without knowing his peculiar vicious nature, have any reason to calculate on his doing, then he has the same protection as the owner of a dog. It is not in the ordinary course of the nature of a horse to kick a child, and, therefore, the owner is not liable, unless he is proved to be aware that the horse had a tendency to acts of that kind." (*i*)

But though, where the gist of the action is the damage caused by animals kept or harbored by the defendant, it is necessary to show the ferocious character of the animal, and that it was known to the defendant, still an owner is, as a general rule, responsible for trespasses committed by his animals, *e. g.*, horses or oxen, whatever their character. In other words, a trespass is an act actionable in itself, and the owner who keeps animals which trespass is looked upon as committing the trespass himself. X.'s horse, through the defect of a gate which X. was bound to repair, got out of his farm and strayed into A.'s field, and there kicked and injured A.'s horse; it was held, that X. was liable for the trespass by his horse, and that it was not necessary to prove that the horse was vicious, and that the plaintiff knew of it. (*l*) Yet an owner, though liable for every trespass committed by his horses, oxen, &c., is probably not liable for trespasses committed by animals, such as dogs or cats, naturally given to wander. "The question was much argued" in a particular case, (*m*) "whether the owner of a dog is answerable in tres-

(*i*) Cox v. Burbidge, 32 L. J. 90, 91, C. P., judgment of ERLE, C. J.; and see Ibid., 92, judgment of KEATING, J.

(*l*) Lee v. Riley, 34 L. J. 212, C. P.; 18 C. B., N. S., 722; Cox v. Burbidge, 32 L. J. 89, C. P.; Powell v. Salisbury, 2 Y. & J. 391.

(*m*) Reed v. Edwards, 17 C. B., N. S., 245; 34 L. J. 31, C. P.

pass for every unauthorized entry of the animal into the land of another as [he] is [in] the case of an ox, and reasons were offered . . . for a distinction in this respect between oxen and dogs or cats, on account [427] of, first, the difficulty or impossibility of keeping the latter under restraint; and secondly, the slightness of the damage which their wandering ordinarily causes; thirdly the common usage of mankind to allow them a wider liberty; and, lastly, their not being considered in law as absolutely being the chattels of the owner so as to be the subject of larceny." (*q*) The true reason for this exemption from liability is, it would seem, the last. The owner, not being in a strict sense the possessor of such animals, he is not looked upon as liable for, or as the cause of their acts.

Exception—Where persons are protected from actions.

Certain persons are in different degrees protected by their positions from an action for tort.

Judges.—A judge can not be sued (*r*) for a malicious act, even though done maliciously and corruptly.

This exemption extends to the judge of a county court, and where such a judge was sued for slanderous words spoken by him during the trial of a cause, falsely and maliciously, and without reasonable and probable cause, and not bonâ fide in the discharge of his duty, it was held that no action would lie; (*s*) "for though the question [arose] perhaps for the first time with reference to a county court judge, a series of decisions, uniformly to the same effect, extending from the time of Lord COKE to the present time, establish the general proposition that no action will lie against a judge for any acts done or words

(*q*) Reed v. Edwards, 34 L. J. 34, C. P., per CURIAM. Compare 28 & 29 Vict. c. 60, as to injuries done to cattle by dogs; under which Act it is not necessary to prove,—1, a previous mischievous propensity in the dog; 2, the knowledge thereof by the owner; 3, the negligence of the owner.

(*r*) Kemp v. Neville, 10 C. B., N. S., 523; 31 L. J 158, C. P., esp. 10 C. B. N. S., 549–551.

(*s*) Scott v. Stansfield, L. R. 3, Ex. 220.

spoken in his judicial capacity in a court of justice. This doctrine has been applied, not only to the superior courts, but to the court of a coroner, and to a court-martial, [428] which is not a court of record. It is essential in all courts that the judges who are appointed to administer law should be permitted to administer it under the protection of the law, independently and freely, without favour and without fear." (*t*) There does not seem to be in theory much, if any, distinction between the protection extended to a judge of the superior courts and that given to a judge or judicial officer of an inferior court such as a county court judge, (*u*) the chancellor of the universities, (*x*) coroners, (*y*) returning officers, (*z*) magistrates, (*a*) &c. For though no judge or person acting judicially can be sued for any adjudication according to the best of his judgment, in a matter within his jurisdiction, (*b*) even though he act maliciously, (*c*) any judge may be sued for an act not done in his judicial character. The only question is, whether the judge of a superior court is liable to an action for judicial proceedings beyond the scope of his jurisdiction. (*d*)

The judge of an inferior court is certainly liable to be sued for acts not within his jurisdiction, (*e*) provided that he knew, or had the means of knowing, that they were not so. (*f*) "The Privy Council say that trespass will not lie for a judicial act without jurisdiction, unless, the judge had the means of knowing the defect of jurisdiction, and it [429] lies on the plaintiff in every case to prove that

(*t*) Scott v. Stansfield, L. R. 3, Ex. 222, 223, judgment of KELLY, C. B. Compare Dawkins v. Paulet, L. R. 5, Q. B. 94.

(*u*) Scott v. Stansfield, L. R. 3, Ex. 220.

(*x*) Kemp v. Neville, 10 C. B., N. S., 523; 31 L. J. 158, C. P.

(*y*) Garnett v. Ferrand, 6 B & C. 615.

(*z*) Tozer v. Child, 7 E. & B. 377; 27 L. J. 151, Q. B. (Ex. Ch.).

(*a*) Calder v. Halkett, 3 Moo. P. C. 28; Gelen v. Hall, 2 H. & N. 379; 27 L. J. 78, M. C.

(*b*) Kemp v. Neville, 10 C. B., N. S., 523; 31 L. J. 158, C. P.

(*c*) Scott v. Stansfield, L. R. 3 Ex. 220.

(*d*) Taafe v. Downs, 3 Moo. P. C. 36, n., where a distinction is drawn between the judges of superior and inferior courts.

(*e*) Houlden v. Smith, 14 Q. B. 841; Pease v. Chaytor, 32 L, J. 121, M. C.; 3 B. & S. 620.

(*f*) See note (*f*), next page.

fact. (*f*) In Houlden v. Smith, the judge of the county court was held liable in trespass, because he was within the exception thus laid down, and had the means of knowing that he had no jurisdiction." (*g*) Though the decision of a judicial officer upon a matter of fact within his jurisdiction can not be put in issue in an action against him, (*h*) yet he can not give himself jurisdiction by a decision with regard to the facts on which the jurisdiction depends. (*i*)

Magistrates, constables, &c.—Magistrates, constables, &c., are to a great extent protected.

A magistrate, for example, can not be sued for anything done within his jurisdiction, unless it be alleged that the act was done without reasonable and probable cause. (*k*) And though an action can be brought for acts done without or in excess of jurisdiction without alleging malice or want of reasonable or probable cause, yet in this case, too, no action can be brought until the conviction or order has been quashed, (*l*) and, further, where a magistrate is sued in respect of anything done in execution of his office, he has special privileges with respect to the time within which the action must be brought, notice of action, venue, &c.

Constables and police-officers are also to some extent protected persons, since, for example, a constable, headborough, or other officer, or any person acting by his order or in his aid, is protected when acting in obedience to a warrant. He can not be sued without demand of a copy and perusal of the warrant, nor can he be [430] sued when once such demand has been complied with. (*n*)

(*f*) See Calder v. Halkett, 3 Moo. P. C. 28; and contrast Houlden v. Smith, 14 Q. B. 841. It is not absolutely decided on which side lies the burden of proving that a judicial officer has acted without jurisdiction. Compare Garrett v. Morley, 1 Q. B. 18, with Calder v. Halkett, 3 Moo. P. C. 28.

(*g*) Kemp v. Neville, 10 C. B., N. S., 551, per CURIAM.

(*h*) Ibid., 10 C. B., N. S., 523; 31 L. J. 158, C. P.; Mould v. Williams, 5 Q. B. 469.

(*i*) Mould v. Williams, 5 Q. B. 469.

(*k*) 11 & 12 Vict. c. 44, s. 1.

(*l*) Ibid., s. 2.

(*n*) 24 Geo. II. c. 44, s. 6; Atkins v. Kilby, 11 A. & E. 777; Clark v.

Persons are also often to some extent protected either because they belong to particular classes or have done the acts complained of whilst acting under or in pursuance of particular statutes. Such persons may, indeed, be sued, but they are entitled to privileges, of which the most ordinary are a month's notice of action, freedom from liability to be sued after the lapse of a short time from the date of the act complained of, the right to defend themselves by tendering compensation, and so forth. Thus, for example, the Metropolitan Board of Works are entitled to one month's notice of action against them; so are persons acting in pursuance of, *e. g.*, the Coining Act, (*o*) the Hackney Coach Act, (*p*) the Juvenile Offenders' Act, (*q*) the Larceny Act, (*r*) the Contagious Diseases (Animals) Act, (*s*) and many other statutes which it is not within the scope of the present work to enumerate; and when the wrong done by the defendant is an act done or intended to be done under or by virtue of the powers of any statute, the wrong-doer is often at least so far protected as to be entitled to notice of action and other like privileges.

RULE 98.—One, or any, or all of several joint wrong-doers may be sued.

Every person who joins in committing a tort is separately liable for it, and can not escape liability by
[431] showing that another person is liable also, nor can one of several wrong-doers compel the plaintiff to sue him together with the persons with whom he has joined in committing the wrong. X., Y., and Z., for example, join in assaulting A.; A. may sue either all of

Woods, 2 Exch. 395; 17 L. J. 189, M. C. See as to officers of county courts, 19 & 20 Vict. c. 108, s. 60.

(*o*) 24 & 25 Vict. c. 99, s. 33.
(*p*) 1 & 2 Will. IV. c. 22, s. 73.
(*q*) 10 & 11 Vict. c. 82, s. 17.
(*r*) 24 & 25 Vict. c. 96, s. 113.
(*s*) 30 & 31 Vict. c. 155, s. 57.

them or any two of them, *e. g.*, X. and Y., or any one of them, *e. g.*, X.

If, further, A. sues X. alone, X. can not take any steps to compel him to make Y. or Z. co-defendants; and X., if found guilty, will have to pay compensation, not for a third, but for the whole, of the damage done to A.; and when X. has paid the whole of the damages, he can not compel Y. and Z. to repay him any part of what he has been compelled to pay; for it is a maxim of law that there is no right of contribution between wrong-doers. (*t*)

There does not exist, in short, any joint liability for a wrong in the sense in which there exists a joint liability for a breach of contract, and the position of joint wrong-doers is most clearly seen by a comparison with that of co-contractors. Suppose that X., Y., and Z. are co-contractors, and break their contract with A.; A. is, properly speaking, bound to sue them jointly. He may, indeed, sue, *e. g.*, X. alone, but X. can in general (*u*) compel him to make Y. and Z. co-defendants. If, however, X. can not do this, he has to pay the whole of the damages for the breach of contract, but he has a right to sue each of his co-contractors for a third of the amount which he has been compelled to pay.

Tort must be joint.—Where an action is brought against several co-defendants it is essential that the wrong complained of be joint. If, for example, A. sues X., Y., and Z. in trover, he must prove a joint act of conversion against all of them, and if he proves separate acts of conversion he must take a verdict against those defendants alone who were parties, and the other defendants must be found not guilty. (*y*) Where, therefore, trover lies against a succession of wrong-doers, as where X. takes A.'s goods and sells them to Y., who re-sells them to Z., who refuses to give them up to [432]

(*t*) Merryweather v. Nixan, 2 Smith, L. C., 6th ed., 481.

(*u*) See *ante*.

(*y*) Coryton v. Lithebye, 2 Wms. Saund. 117 c, note (*g*); Wilbraham v. Snow, Ibid., 47 u, note (*i*).

A., the successive wrong-doers can not be sued together, because they are each guilty of a different act of conversion, *i. e.*, of a different tort. (*z*) Therefore, when bankrupts and their assignees were joined as defendants in an action of trover, and a verdict passed against all the defendants upon evidence that the bankrupts, before their bankruptcy, had converted the goods of the plaintiff by pledging them without authority, and that the assignees, after the bankruptcy, had refused to deliver them up on demand, the court held that the conversions were separate, and granted a new trial for want of evidence of a joint conversion. (*a*)

1. *What wrongs can be joint.*—The great majority of wrongs can be committed by two or more persons jointly, and further, all persons who aid, counsel, direct, or join in a trespass can be sued together. (*b*) Hence, every one who takes part in a trespass, *e. g.*, X., at whose command Y. trespasses on A.'s land, and Z., who joins with Y. in trespassing, can all be sued as joint wrong-doers. And in substance the same principle applies, it is conceived, to torts which do not come under the head of trespass. If, for example, Y., at the command of X., converts the goods of A., both X. and Y. are guilty of conversion, and can be sued as for a joint act of conversion. (*c*)

The application of the principle that all persons who take part in a trespass are jointly liable may be illustrated by examining who are the persons liable to be sued for a special kind of trespass, viz.:

[433] *Trespass under color of legal proceedings, or false imprisonment.* (*d*)—Every person who interferes with the liberty or property of another is primâ facie a trespasser, and is liable to an action unless he can show legal justifi-

(*z*) Wilbraham v. Snow, 2 Wms. Saund., 47 u, note (*i*).

(*a*) See Nicoll v. Glennie, 1 M. & S. 588.

(*b*) Petrie v. Lamont, 1 Car. & M. 96.

(*c*) Wilbraham v. Snow, 2 Wms. Saund. 47 *x*.

(*d*) This tort requires special notice, from the fact that a large number of persons are often prima facie liable to an action for it, and it requires some care to perceive which of them can be sued with success. This trespass need not necessarily amount to false imprisonment, for it may be simply a trespass to the plaintiff's goods, *e. g.*, where they are wrongfully taken in execution.

cation for his act. When, therefore, a trespass is committed under color of legal proceedings, *e. g.*, when A. is wrongfully arrested on a writ of *ca. sa.*, or his goods are wrongfully taken in execution, some one or more, and it may be all, of the following persons must be guilty of a trespass, viz., the plaintiff in the original action, his attorney (who sued out the writ), the sheriff, and the sheriff's officers. Some of these persons must be liable; otherwise there can have been no error, and no trespass has been committed, and if none of them have any justification they may all be sued together. But though some of these persons must be liable, they are not generally all liable, for some of them are, in most cases, legally justified in the acts they have committed. Which are liable and which are not depends upon the stage of the proceedings at which the error in the process arises.

Error in foundation of process.—The proceedings may be erroneous ab initio, as where a writ is issued on a judgment more than a year old without a *sci. fa.* (*e*) The writ in this case ought not to have been issued at all. The attorney, therefore, who sued out the writ and the plaintiff in the original action who employed him are both liable as trespassers. (*f*)

The attorney is liable as being the person who issues the writ, the plaintiff as being the attorney's [434] employer, "since it has always been held that a man is liable for the acts of his attorney in the conduct of a suit at law brought under his authority. He gives to the attorney the right to represent him, and for whatever the attorney does he is responsible." If the writ is only voidable, as where it is issued on an execution more than a year old without a *sci. fa.*, the plaintiff and his attorney can not be sued until the writ is set aside. (*g*) But if it is void they can be sued before it is set aside. (*h*)

(*e*) Riddell v. Pakeman, 2 C. M. & R. 33; Blanchenay v. Burt, 4 Q. B. 707.

(*f*) Brooks v. Hodgkinson, 4 H. & N. 712; 29 L. J. 93, Ex.; Codrington v. Lloyd, 8 A. & E. 449; Barker v. Braham, 3 Wils. 396.

(*g*) Collett v. Foster, 2 H. & N. 356; 26 L. J. 412, Ex.; Esp. 414, judgment of POLLOCK, C. B.

(*h*) Blanchenay v. Burt, 4 Q. B. 707.

The sheriff and his officers can not be sued. The reason of this is that all the sheriff and his officers need do is to look to the writ, which is the order of the court to them, and see whether it justifies their proceedings. If it does, the writ itself can be pleaded in defense of their acts under it. (*i*) It will not, however, justify the sheriff, if the court which issues it has no jurisdiction. (*k*)

Process irregular in form.—The plaintiffs in the original action may have a right to issue a writ; but the writ issued may be irregular because of a defect in its form.

The attorney and his client are liable. The sheriff and his officer are primâ facie not liable. (*l*) But if the irregularity is enough to make the writ void, the client, attorney, and sheriff are all liable, (*m*) but the officer is certainly not liable unless the writ is bad on its face.

Error in execution.—The writ may be rightly issued and be regular in form, and yet a mistake may be [435] made in executing it. The sheriff and his officers are in this case liable. "There is no doubt that the sheriff is liable for all acts done, and neglects of duty, by the bailiff in the execution of a writ, on the ground that if the sheriff thinks fit to commit the execution of a writ, which he is bound to execute, to another, he is responsible if that person does not execute it properly, and is in the same condition as if he had executed it himself, (*n*) the case of a sheriff differing in this respect from the liability of an ordinary principal for the acts of an agent who does not pursue the authority committed to him. Therefore, if a sheriff's officer arrests a wrong person, or

(*i*) Barker v. Braham, 3 Wils. 376; Countess of Rutland's Case, 6 Coke, 54 a.

(*k*) Case of The Marshalsea, 10 Coke, 69. The sheriff is bound to know whether the Court has jurisdiction or not; but his officers may apparently justify under any writ not bad on its face. Carratt v. Morley, 1 Q. B. 18; Andrews v. Marris, Ibid., 3. Conf. Morse v. James, 1 Willes, 122.

(*l*) Parsons v. Lloyd, 2 W. Bl. 845.

(*m*) Andrews v. Marris, 1 Q. B. 3; Parsons v. Lloyd, 2 W. Bl. 845.

(*n*) Parrott v. Mumford, 2 Esp. 585. Expressions are used in Wood v. Finnis which imply that the liability of a sheriff extends beyond that of any employer. The difference, however, between the position of a sheriff and that of an ordinary master seems to be slight.

arrests the right person after the return day, or takes a wrong person's goods under a *fi. fa.*, or even if he arrests under a writ of *fi. fa.*, or is guilty of extortion in insisting on being paid a sum of money as the price of liberation from imprisonment under a *ca. sa.*, the sheriff is liable. "Though none of these acts are done in pursuance of the authority of the writ, yet they are done in the execution, or, as it is said, under color of it, and the sheriff is exactly in the same position as if he had done these acts himself." (*o*)

The sheriff is not liable for wrongful acts of his officers which are not done under color of the writ, *e. g.*, for an act of extortion committed by a person who is not the person to whom the writ is addressed. (*p*) The plaintiff and his attorney are not liable unless they interfere in the execution of the writ, in which case they are. (*q*)

What torts can not be joint.—Some few torts, [436] such as slander (and perhaps seduction), can not be the act of more than one person. For "one action will not lie against several persons for speaking the same words, as where a man brought an action against two for saying 'thou hast stolen plate, . . . and we do arrest thee of that felony,' and, there being a verdict for the defendant, it was moved in arrest of judgment, that the action does not lie against two jointly, because the words of the one are not the words of the other; but there ought to have been several actions, in like manner, as two persons can not bring a joint action for words; and so it was resolved by the court, for these several causes can

(*o*) Woods v. Finnis, 7 Exch. 371, per CURIAM. See Smart v. Hutton, 8 A. & E. 568; Gregory v. Cotterell, 5 E. & B. 571; 25 L. J. 33, Q. B. (Ex. Ch.) Raphael v. Goodman, 8 A. & E. 565.

(*p*) Slack v. Brander, 1 Esp. 42; George v. Perring 4 Esp. 63.

(*q*) Meredith v. Flaxman, 5 C. & P. 99. Conf. Cronshaw v. Chapman, 7 H. & N. 911; 31 L. J. 277, Ex.; Collins v. Evans, 5 Q. B. 820; 13 L. J. 180, Q. B.; Childers v. Wooler, 29 L. J. 129, Q. B.; Humphrys v. Pratt, 5 Bligh, N. S., 154; Davies v. Jenkins, 11 M. & W. 745; 12 L. J. 386, Ex.; Rowles v. Senior, 8 Q. B. 677; 15 L. J. 231, Q. B.; Green v. Elgee, 5 Q. B. 99; 14 L. J. 162, Q. B. The sheriff is not liable for arrest of privileged persons. Countess of Rutland's Case, 6 Coke, 54 a; Philips v. Naylor, 3 H. & N. 14; 27 L. J. 222, 223, Ex.; 4 H. & N. 565; 28 L. J. 225, Ex. (Ex. Ch.).

no more produce a joint action than their words and tongues may be said to be one." (*r*)

Judgment recovered.—A judgment recovered against one of several wrong-doers is (even without execution or satisfaction) a bar to an action against the others for the same cause of action. If X., Y., and Z. are joint wrong-doers a judgment against X. for the joint wrong is a bar to an action against Y. or Z. (*s*)

But, as a general rule, a judgment against one person for one cause of action can not be a defense to an action against another person for another cause of action. But to this principle there is an exception in the case of actions for conversion, or for trespass to goods. It has been already pointed out that if X. converts the goods of A. and sells them to Y., who refuses to give them up to A., X. and Y. are each liable to be sued by A. It is clear, also, that there is in this case a separate cause of action against each, yet the recovery of a judgment by A. against X., if followed by satisfaction, is a bar to [437] an action against Y. (*t*) The reason of this peculiarity appears to be that the damage to A. is the loss of the chattel; and though the conversion by X. is different from the conversion by Y., compensation by the one satisfies the claim of the plaintiff, and is therefore a defense in an action against the other. Hence, the mere judgment is no defense unless accompanied by satisfaction. When, therefore, the plaintiff has obtained a merely interlocutory judgment against the defendant he may drop the action and proceed against the other; (*u*) and where the damage is not estimated on the footing of the full value of the goods this fact is, it seems, an answer to a plea of judgment recovered against one defendant in an action brought against the other. (*x*) A more technical ground, sometimes given for the effect of judgment and satisfaction, is that "by recovery in trespass for taking, or trover for

(*r*) Coryton v. Lithebye, 2 Wms. Saund. 117 c.
(*s*) Ding v. Hoare, 13 M. & W. 494; 14 L. J. 29, Ex.
(*t*) Cooper v. Shepherd, 3 C. B. 266; 15 L. J. 237, C. P.
(*u*) Marston v. Phillips, 12 W. R. 8.
(*x*) Wilbraham v. Snow, 2 Wms. Saund. 47 *d e*, note (*z*).

converting, personal chattels, followed by satisfaction, the property is altered, and rests in the defendant; for solutio pretii emptionis loco habetur." (*y*)

Torts founded on contract. (*z*)—As a plaintiff can be compelled by a plea in abatement to sue all of several co-contractors, but may, at his option, sue any one or more of several joint wrong-doers, the question arises whether, when an action is brought for a tort founded on contract, a plaintiff can or can not be compelled to join all the persons who are parties to the contract; or, in other words, whether he can avoid a plea in abatement by treating a breach of contract as a tort.

The answer to this inquiry is, that what must be looked to is the real nature, and not the form, of the action, "therefore if an action be brought against one only of several persons, upon matter founded in contract, [438] though the form of the action be case for malfeasance or non-feasance, and the plea not guilty [*i. e.*, though the action be in form an action for tort], the defendant [may] plead it in abatement, (*a*) . . . and from all the cases, and especially from Bretherton v. Wood, (*b*) the principle appears to be this, that where the action is maintainable for the tort simply without reference to any contract made between the parties, no advantage can be taken of the omission of some defendants, or of the joinder of too many; (*c*) as, for instance, in actions against carriers which are grounded on the custom of the realm. But where the action is not maintainable without referring to a contract between the parties, and laying a previous ground for it by showing such contract, there, although the plaintiff shapes his case in tort, yet he shall be liable to a plea in abatement if he omit any defendant, or to a

(*y*) Ibid. 47 *c c*; Bird v. Randall, 3 Burr. 1345; Buckland v. Johnson, 15 C. B. 145; 23 L. J. 204, C. P.

(*z*) See *ante*.

(*a*) Powell v. Layton, 1 B. & P., N. R., 365; Max v. Roberts, Ibid. 454; Weall v. King, 12 East, 452; Lush, Practice, 3rd ed. 212; Bullen, Pleadings, 3rd ed., 708; Cabell v. Vaughan, 1 Wms. Saund. 291 *e*, 291 *f*.

(*b*) 3 B. & B. 54.

(*c*) Chapter XXXIV.

nonsuit if he join too many, for he shall not, by adopting a particular form of action, alter the situation of the defendant." (*d*)

It is, however, as already pointed out, (*e*) sometimes difficult to determine whether a given action is, in substance, an action ex contractu, or an action ex delicto.

Exception.—Persons sued as joint owners of land.

There is a distinction between ordinary actions for tort and those which are brought against persons in respect of their common interest in land; for if one only of several joint tenants or tenants in common is sued for an injury arising from the state of their land, the non-joinder of the other co-tenants may be pleaded in abate-
[439] ment, and this rule applies to partners as well as to persons who are not partners. (*f*)

RULE 99.—The liability to be sued for a tort can not be transferred or assigned.

This is a mere application of the general principle, (*g*) that the liability to be sued can not be transferred.

Exception.—Assignment by death

The one real exception to this rule is, that the liability to be sued for some torts is assigned by death, *i. e.*, the personal representatives of the wrong-doer can in some cases be sued for wrongs committed by him. (*h*)

An apparent rather than a real exception arises in the case of marriage. A woman remains after as before marriage liable for the torts committed by her, but since she

(*d*) Cabell v. Vaughan, 1 Wms. Saund. 291 *f*.

(*e*) See *ante*.

(*f*) See 1 Lindley, Partnership, 2nd ed., 489; 1 Wms. Saund. 291 *f* & *g*. Mitchell v. Tarbutt, 5 T. R. 649.

(*g*) Rule 9.

(*h*) Chapter XXXII.

can not during coverture be sued alone, her husband must be joined as defendant in actions for wrongs done by her. (*i*)

RULE 100.—Each wrong-doer's separate liability to be sued for a tort passes on his death (if it survives at all) to his personal representatives. The joint liability of several wrong-doers passes on the death of each to the survivors.

X., Y., and Z. commit a joint tort against A., *e. g.*, convert his goods. X., and Y., and Z. are each liable to be sued separately. This separate liability passes on the death of Z. (supposing it to survive him at [440] all) (*k*) to M., his representative.

X., Y., and Z. are further liable to be sued jointly. This joint liability survives on the death of Z. against X. and Y., but it does not pass to M., Z.'s representative. In other words, after Z.'s death A. may sue either X. or Y., or X. and Y., or M.; but he can in no case sue X., and Y., and M.

Joint wrong-doers are, in fact, in the same position as persons who have broken both a joint and several contract. The common liability on the joint contract passes on the death of one contractor to the surviving contractors. The separate liability of each on his separate contracts passes on the death of each to his representatives.

(*i*) Rule 107. The liability for torts is in no case transferred by bankruptcy.

(*k*) Chapter XXXII.

CHAPTER XXVI.

PRINCIPAL AND AGENT.

RULE 101.—A principal is liable to be sued for the torts of an agent either committed by the command of the principal, or subsequently assented to or ratified by him.[1]

[1] Or, if the agent is responsible, they may be severally liable. Gass v. Coblentz, 43 Mo. 337; Creed v. Hartman, 29 N. Y. 591; Sewall v. St. Paul, 20 Minn. 511; Sproul v. Hemingway, 14 Pick. 1; or, they may be sued jointly; Galena R. R. Co. v. Rae, 18 Ill. 488; Hewett v. Swift, 3 Allen, 420; Hunter v. Hudson, 20 Barb. 493; Phelps v. Wait, 30 N. Y. 78; Carman v. R. R., 4 Ohio, 399; Severin v. Eddy, 52 Ill. 189. An agent is personally liable for deceit; Durst v. Barton, 47 N. Y. 167; Fox v. N. Lib., 3 W. & S., 103; Moore v. Sanborne, 2 Mich. 519; Evansville v. Baum, 26 Ind. 70; Atlantic Co. v Merch. Co., 10 Gray, 532; Howe v. Newmarch, 12 Allen, 49; Griswold v. Haven, 25 N. Y. 595; Smith v. Tracy, 36 Id. 79; but if the principal directed him, he is alone responsible; Wharton on Agency and Agents, § 474. So if the principal sue the agent for the proceeds of his illegal act he ratifies it; Partridge v. White, 56 Me. 564; Drennan v. Walker, 21 Ark. 539; Harris v. Miner, 28 Ill. 135; and see Frank v. Jenkins, 22 Ohio St. 597; Episcopal Society v. Episcopal Church, 1 Pick. 372; Shiras v. Morris, 3 Cowen, 60; Peters v. Ballestier, 3 Pick. 495; Woodward v. Suydam, 11 Ohio, 363; Ham v. Boody, 20 N. H. 411; Copeland v. Ins. Co., 6 Pick. 198; President, &c., v. Barry, 17 Mass. 97; and if he receive any subsequent benefit from the tort the rule is the same; Lee v. West, 47 Ga. 311; and see Durst v. Burton, 2 Lans. 137; Sharp v. N. Y., 40 Barb. 257; Davis v. Bemis, 40 N. Y. 453; Chester v. Dickinson, 52 Barb. 349; Allerton v. Allerton, 50 N. Y. 670; Doggett v. Emerson, 3 Story, 700; Cook v. Castner, 9 Cush. 266; Sandford v. Handy, 23 Wend. 260; Elwell v. Chamberlain, 31 N. Y. 619; Kibbs v. Insurance Co., 11 Gray, 163. Merton

If A., by the command of P., commits a tort against T., *e. g.*, converts his goods, (*a*) P. is liable to be sued as well as A. P. is liable, strictly speaking, not as principal or master, but as a joint wrong-doer. (*b*)

P. can, therefore, be sued directly for the tort, and if

(*a*) Throughout this chapter P. stands for the principal, or employer; A. the agent or servant employed; T. the third party injured.

(*b*) Story, Agency, s. 455; Smith, Master and Servant, 2nd ed., 207.

v. Scull, 23 Ark. 289; Veazie v. Williams, 8 How. 138. He is liable for torts incident to the agency; Detroit v. Corey, 9 Mich. 165; Darmstetter v. Moynahan, 27 Id. 88; unless he is a public officer, when he is not liable for tortious acts of his subordinate; Schroyer v. Lynch, 8 Watts, 453; Richmond v. Long, 17 Grat. 375; Sawyer v. Corse, 19 Id. 230; McMillan v. Eastman, 4 Mass. 378; Franklin v. Low, 1 Johns. R. 396; Bayley v. Mayor, 3 Hill, 531; Duncan v. Findlater, 6 Cl. & F. 903; Wiggins v. Hathaway, 6 Barb. 632; but see Ogden v. Maxwell, 3 Blatchf. 319; and a principal will be liable for a nuisance; Hardrop v. Gallaher, 2 E. D. Smith, 523; Selvers v. Nordinger, 30 Ind. 53; but see Stone v. Railroad Co., 19 N. H. 100; Lowell v. Railroad Co., 23 Pick. 24. Where the agent had liberty to take his own course the principal is not liable; Hillard v. Richardson, 3 Gray, 349; DeForest v. Wright, 2 Mich. 388; Barry v. St. Louis, 17 Mo. 121; Metz v. Buffalo, &c., R. R. Co., 58 N. Y. 61; Clark v. Railroad, 28 Vt. 103; Hilliard v. Richardson, 3 Gray, 349; Linton v. Smith, 8 Id., 147; Forsyth v. Hooper, 11 Allen, 419; Pfau v. Williamson, 63 Ill. 16; Cincinnati v. Stone, 5 Ohio St. 38; Kelly v. Mayor, 11 N. Y. 432; unless he has expressly retained a right to interfere; Stone v. Codman, 15 Pick. 297; Luttrel v. Hazen, 3 Sneed, 20; Chicago v. Joney, 60 Ill. 383; Chicago v. Dermothy, 61 Ill. 431; and it is no defense that he expressly forbade the act; Oliver v. Transportation Co., 3 Oreg. 84; Priester v. Angley, 5 Rich. 47; Philadelphia, &c., R. R. Co. v. Derby, 14 How. 468; Weed v. Railroad Co., 17 N. Y. 362; Bryant v. Rich, 106 Mass. 180; Goddard v. R. R., 57 Me. 202; Cosgrove v. Ogden, 49 N. Y. 255; Locke v. Stearns, 1 Metc. 500; Howe v. Newmarch, 12 Allen, 49; Southwick v. Estes, 7 Cush. 385; Moir v. Hopkins, 16 Ill. 213; Penn. Steam Nav. Co. v. Hungerford, 6 Gill. & J. 291; Garretson v. Duenckel, 50 Mo. 104; Passeng. R. R. v. Young, 21 Ohio St. 518; Sherley v. Billings, 8 Bush. 147.

the wrong itself is one for which trespass lies, *e. g.*, an assault, or an arrest, can be sued as a trespasser. His liability does not depend upon the existence of the relation of master and servant, (*c*) and therefore may arise where this relation does not exist. P. was driving in a hired carriage, and ordered the postilion to drive in a reckless manner. He was held responsible for an injury caused by such driving, though the owner of the carriage was the postilion's master, and would be, as a general rule, the person liable for torts committed by him while driving. (*d*) "The cases in which it has been decided that an action will not lie against the hirer of a car-
[442] riage and horses for the misconduct of the driver, not being his servant, do not apply here; for this is an action treating the defendant as a co-trespasser, and is not brought against him as a master for the misconduct of his servant. The mere fact of the defendant being one of the persons who hired the carriage and horses would not make him liable in this action; but it must be shown that he was assenting to the act from which the injury occurred to the plaintiff." (*e*)

If P. expressly commands A. to do a wrongful act it is easy to see that he is a joint wrong-doer with A. But a person may be looked upon as authorizing or command-

(*c*) McLaughlin v. Pryor, 4 M. & G. 48.

(*d*) See Rule 102.

(*e*) McLaughlin v. Pryor, 4 M. & G. 60, judgment of ERSKINE, J. It is of importance to distinguish the direct liability of a person who orders a wrong to be committed, and therefore is looked upon as a joint wrong-doer, with the person through whose instrumentality the injury is done, from the indirect liability of a master for the acts of his servants. In the first case the principal is liable, because the act complained of is his own act; in the second case the employer is liable, not because he did, or authorized, the particular act, but because his employment of a negligent servant has led to the act complained of being done. The distinction is very nearly equivalent to that between trespass and case. Wherever a master can be sued in trespass he must be considered as directly authorizing the wrong done, and where he is only indirectly responsible he must be sued in case. There are, however, torts for which the principal is directly responsible, but for which the only form of action against either principal or agent is case, *e. g.*, an action for fraud or for conversion (since trover is a species of case). See Smith, Master and Servant, 2nd ed., 207; Scott v. Shepherd, 1 Smith, L. C., 6th ed., 417; Sharrod v. London and North-Western Rail. Co., 4 Exch. 580.

ing, and therefore as directly responsible for, the commission of wrongs which he does not order. Thus, if a wrongful act on the part of a servant be a direct or necessary consequence of an act which his master has ordered to be done, his master will be directly liable for the wrongful act itself. "Suppose the case of two persons possessed of contiguous unenclosed land, and that one of them desired his servant to drive his cattle, but not to let them go upon the land of his neighbor; the master will be answerable in trespass [*i. e.*, directly for the act], because he has only a right to expect from his servant ordinary, and not extraordinary, care. [443] If the servant, therefore, in carrying into execution the orders of his master, uses ordinary care, and an injury is done to another, the master is liable in trespass. If the injury arise from want of ordinary care the master will only be liable in case"; (*f*) or, to put the distinction in less technical language, if P. employs A. to do an act which naturally leads to the commission of a wrong, P. is directly responsible for the wrong itself, just as if he had ordered that wrong to be committed; whilst, on the other hand, if P. employs A. to do an act which may be done without the commission of any wrong, and A., through his carelessness or incompetence, injures T. in the course of carrying out T.'s directions, then P. is not responsible for the act itself, though, if he is A.'s master, he may be responsible for the consequences of employing an incompetent servant. (*g*)

If, again, a wrongful act be committed by a servant in the usual course of his employment, although there be no express command on the part of his master to do the specific act complained of, yet in such cases the master

(*f*) Gregory v. Piper, 9 B. & C. 591, 594, judgment of LITTLEDALE, J.

(*g*) See Rule 102. On this point the following cases should be compared: McManus v. Cricket, 1 East, 106; Gordon v. Rolt, 4 Exch. 365, esp. 366, 367; Sharrod v. London and North-Western Rail. Co., 4 Exch. 580; Goff v. Great Northern Rail. Co., 30 L. J. 148, Q. B.; Seymour v. Greenwood, 6 H. & N. 359; 30 L. J. 189, Ex.; 7 H. & N. 355; 30 L. J. 327, Ex. (Ex. Ch.). This distinction between direct and indirect liability may appear a fine one, but is of consequence, and will be found to explain some cases in which persons are responsible for the acts of others who yet are not their servants.

may be liable to an action of trespass, *i. e.*, as being directly responsible for the act, for a command will be implied from the nature of the servant's employment. (*h*) But the direct liability in such instances can, it is conceived, be with difficulty distinguished from a master's indirect liability for the acts of his servant done in the course of his employment. (*i*)

[444] *Ratification.* (*k*)—The person who ratifies a tort becomes a wrong-doer from the beginning. (*l*) Thus, if P. ratifies the unauthorized purchase by A., his agent, of a chattel which the vendor had no right to sell, P. is guilty of conversion, although at the time of the ratification he had no knowledge of the circumstances which made the sale unlawful. (*m*)

The following points should be noticed:

1st. In order that the principal may be bound, the tort (*e. g.*, a trespass) must, at the time when A. committed it, have been intended to be done on behalf, and for the benefit, of P.; or, as it is sometime expressed, (*n*) in the name, and avowedly on behalf, of P. "He that receiveth a trespasser, and agreeth to a trespass after it is done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a precedent commandment." (*o*)

2nd. The principal must, in order to be liable, unequivocally adopt the act, and it would seem, though this point is not quite clear, that the act must be ratified and adopted by him, either with the full knowledge of its being tortious, or else with the intention of adopting the act, whether right or wrong. (*p*)

3rd. A principal may sometimes take advantage of a

(*h*) Smith, Master and Servant, 2nd ed., 208.

(*i*) See Rule 102.

(*k*) See *ante*.

(*l*) Bird v. Brown, 4 Ex. 786; 19 L. J. 154, Ex.; Addison, Torts, 3rd ed., 932, 933.

(*m*) Hilbery v. Hatton, 2 H. & C. 822; 33 L. J. 190, Ex.

(*n*) See Addison, Torts, 3rd ed., 932.

(*o*) Coke, 4 Ins. 317.

(*p*) Compare Addison, Torts, 3rd ed., 932; Roe v. Birkenhead Rail. Co., 7 Exch. 36; Hilbery v. Hatton, 2 H. & C. 822; 33 L. J. 190, Ex.

wrongful act done on his behalf, if it were one which, though wrongful in the person who did it, might have been lawfully done by the principal who ratifies it. (*q*) "If A., professing to act by my authority, does that which prima facie amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, [445] and I become a trespasser, unless I can justify the act which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the doctrine of ratification, even in cases of tort. The party ratifying becomes as it were a trespasser by estoppel; he can not complain that he is deemed to have authorized that which he admits himself to have authorized. But the authorities go much further, and show that in some cases where an act which, if unauthorized, would amount to a trespass, has been done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done, to take advantage of it, and to treat it as having been done by his direction. But this doctrine must be taken with the qualification that the act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies." (*r*)

RULE 102.—An employer or master is liable to be sued for the torts of his servant if committed in the course of the servant's employment, and for his master's benefit, or in other words, in the service of his master. (*s*) [1]

(*q*) Bird v. Brown, 4 Exch. 786; 19 L. J. 154, Ex.

(*r*) Bird v. Brown, 4 Exch. 799, per CURIAM. The principle, though chiefly illustrated by actions for trespass, applies to actions for other wrongs. See Addison, Torts, 3rd ed., 853, 854; Hilbery v. Hatton, 2 H. & C. 822; 33 L J. 190, Ex.; Giles v. Taff Vale Rail. Co., 2 E. & B. 822.

(*s*) See Limpus v. London General Omnibus Co., 1 H. & C. 526; 32 L. J 34, Ex. (Ex. Ch.); Seymour v. Greenwood, 30 L. J. 192, Ex., judgment of MARTIN, B.; Laugher v. Pointer, 5 B. & C. 547, 554; Quarman v. Burnett, 6 M & W. 499; Barwick v. English Joint Stock Bank, L. R. 2, Ex. 259 (Ex. Ch.).

[1] See Cantrell v. Colwell, 3 Head, 271; and see, as to rep-

If P. orders A. to commit a tort, P. is directly responsible for it, as being in effect himself the wrong-doer.

[446] But a person who employs another as his servant incurs an indirect liability of a more extensive character, for he is responsible, not only for acts which he either directly or indirectly orders, but also for all the acts or omissions which, even though the employer does not order them, are committed by his servant in the course of his service, or, in other words, which are the result of the master's employing the servant. (*t*) "A master is ordinarily liable to answer in a civil suit for the tortious acts of his servant, if these acts are done in the course of his employment in his master's service. . . . This rule, with some few exceptions, (*u*) . . is of universal application, whether the act of the servant be one of omission or commission; whether negligent, fraudulent, or deceitful, (*x*) or even if it be a positive act of malfeasance or misconduct; if it be done in the course of his employment, the master is responsible for it civiliter to third persons; (*y*) and it makes no difference that the master did not actually authorize, or even know of, the servant's act or neglect, for even if he disapproved of or forbade it, he is equally liable if the act be done in the course of the ser-

(*t*) The liability of a master for the acts of his servant is analogous to the liability of an owner for injuries committed by animals belonging to him. Neither the master nor the owner is liable, because he has himself done the particular act complained of. He is responsible, because the wrong is the result of his having, in the one case, employed, *e. g.*, an incompetent servant, and in the other, kept an animal of habits injurious to his neighbors.

(*u*) For exceptions, see *post*.

(*x*) Compare Chapter XXVIII.

(*y*) Story, Agency, s. 452; Paley, Agency, 294–298.

resentations, Sanford v. Handy, 23 Wend. 260; New York, &c., R. R. Co. v. Schuyler, 34 N. Y. 30; Crans v. Hunter, 28 Id. 389; De Voss v. Richmond, 18 Grat. 338; Morton v. Scull, 23 Ark. 289; Doe v. Robinson, 24 Miss. 688; Thallhimer v. Brinckerhoff, 4 Wend. 394; North River Bk. v. Aymar, 3 Hill, 262; Bennett v. Judson, 21 N. Y. 238; Elwell v. Chamberlain, 31 Id. 611; Colum. Ins. Co. v. Masonheimer, 76 Penn. St. 138; Continental Ins. Co. v. Kasey, 25 Grat. 268; Madison R. R. Co. v. Norwich Sav. Co., 24 Ind. 458; Mutual Ins. Co. v. Cannon, 48 Id. 265.

vant's employment." (*z*) "I am liable," it has been said in the House of Lords, "for what is done by me, and under my orders, by the man I employ, for I may turn him off from that employ when I please. The reason I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit, I am responsible for the consequences of doing it." (*a*) "The master is responsible for the [447] acts of his servant, and that person is, without doubt, liable who stands in the relation of master to the wrong-doer; . . . who has selected him as his servant from the knowledge and belief in his skill and care, and who can remove him for misconduct, and whose orders he is bound to receive and obey." (*b*)

Moreover, though in some cases "it is laid down that the plaintiff is bound to show that the act of which he complains is done by the authority, express or implied of the [master], the criterion is not whether the master has given the authority to the servant to do the particular act, but whether the servant does it in the ordinary course of his employment." (*c*) It is, in fact, to be specially noted that the employer's liability does not depend upon his ordering the particular act; for he may be responsible, even though he forbid it; (*d*) and the cause of this extended liability seems to be, that if an employer were not made responsible for wrongs committed in his service the injured person would be constantly without remedy. (*e*)

It has been maintained that fraud stands in a different position from other torts, and that an employer is not liable to be sued for the fraud of his agent unless he has authorized the particular fraudulent representation complained of. (*f*) But though this view may be supported

(*z*) Smith, Master and Servant, 2nd ed., 183, 184.

(*a*) Duncan v. Findlater, 6 Cl. & Fin. 894, per Lord BROOM.

(*b*) Quarman v. Burnett, 6 M. & W. 499, per CURIAM.

(*c*) Seymour v. Greenwood, 30 L. J. 192, Ex., per MARTIN, B.

(*d*) Lipus v. London General Omnibus Co., 1 H. & C. 526; 32 L. J. 34, Ex. (Ex. Ch.).

(*e*) Ibid., 32 L. J. 46, Ex. (Ex. Ch.), judgment of WILLES, J.

(*f*) See Benjamin, Sale, 350; Cornfoot v. Fowks, 6 M. & W. 358; Udell v.

by good authority, the better opinion seems to be that
"with respect to the question whether a principal
[448] is answerable for the act of his agent in the course
of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved. . . . In all [the] cases [in which the master has been held liable], it may be said that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." (*g*)

One peculiarity in the nature of fraud must, however, be taken into account, which is, that since to constitute fraud there must exist both a statement untrue in itself and knowledge on the part of the person who makes it of its untruth, or at any rate absence of belief in its truth, it may happen that where a false representation is made by an agent, the agent who makes the untrue statement believes it to be true, whilst the principal who knows it to be false, has, though employing the agent to transact his business, not authorized or intended him to make the particular statement. Under these circumstances, the principal can not be made liable for the fraud by combining his knowledge with the act of the agent. (*h*) But here there is no real exception to the rule that an employer is liable for torts committed by his servant in the course of his employment. The reason why the principal can not be sued is that it is "impossible to sustain a charge of

Atherton, 7 H. & N. 172; 30 L. J. 337. Ex.; Western Bank of Scotland v. Addie, L. R. 1, Sc. App. 145. See, further, as to the liability of a corporation for fraud, Chapter XXVIII.

(*g*) Barwick v. English Joint Stock Bank L. R. 2, Ex. 265–267 (Ex Ch.) per CURIAM.

(*h*) Cornfoot v. Fowke, 6 M. & W. 358.

fraud when neither principal nor agent has committed any,—the principal because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor even directed the agent to make it; and [449] the agent, because, though he made a misrepresentation, yet he did not know it to be so at the time when he made it." (*i*)

A master's liability is not diminished by the fact that the servant who commits a tort has been appointed, not by the master directly, but indirectly through the intervention of an agent, *e. g.*, a steward. In order to make P. liable for A.'s acts as his servant, it is necessary to establish, first, that A. was, at the time of committing the act complained of, P.'s servant; secondly, that the act was done in the course of A.'s employment as P.'s servant.

1*st Question.*—Was the servant the defendant's servant? "The law does not recognize a several liability in two principals who are unconnected. If they are jointly liable you may sue either, but you can not have two separately liable." (*k*) P. and M., that is to say, may be joint employers of A. (*l*) in which case they may be sued either jointly or separately for torts committed by A. in their service. But if P. and M. are unconnected, any act done by A. will be considered done in the service either of P. or of M., as the case may be, but the same act will not be considered as done in the service both of P. and of M. It was, for instance, at one time doubted whether the coachman who drives a hired carriage is the servant of the owner of the carriage, or of the hirer, and it was laid down that "he is the servant of one or the other, but not the servant of one and the other. You must bring your action either against the principal or against the coachman who commits the injury, but you can not bring it against the owner and [against] the hirer of the carriage." (*m*) It is now settled (*n*) that the

(*i*) Cornfoot v. Fowke, 6 M. & W. 358, 372, per ALDERSON, B.
(*k*) Laugher v. Pointer, 5 B. & C. 547, 559, per CURIAM.
(*l*) Chapter XXVII.
(*m*) Laugher v. Pointer, 5 B. & C. 556, per LITTLEDALE, J.
(*n*) Quarman v. Burnett, 6 M. & W. 499.

[450] owner, and not the hirer, of the carriage is the master of the coachman, and that therefore the owner, and not the hirer, is liable for damage caused by the coachman's negligent driving ; (*o*) assuming, of course, that the coachman is supplied by the person who lets the carriage, for if the hirer supplies the coachman, he is his master, and liable for his negligence.

The principle on which the question under consideration must be answered is, it seems, that A. is the servant of the person by whom he can be dismissed, and not of the person who employs and may even pay him, but has no power to dismiss him. This may be the case with servants at hotels. They frequently receive no wages from the innkeeper, but trust entirely to what they receive from the persons who resort to the hotel, yet they are not the less the servants of the innkeeper. (*p*)

Contractor's servants not servants of employer.—A person who employs another (commonly called a contractor) to perform any service for him, *e. g.*, build a house, is not the employer of the contractor's workmen or other servants, and is therefore, as a general rule, not liable for torts committed by them. Where, for instance, a company employed a contractor to build a viaduct, and a man was killed, owing to negligence on the part of the contractor's workmen, the company, though it had reserved to itself the power to dismiss incompetent workmen, if the contractor should employ them, was nevertheless held not to be liable. (*q*) So, where a butcher bought a bullock in Smithfield Market, and employed a licensed drover to drive it home, and the drover employed a boy through whose negligence the bullock injured the plaintiff's property, the butcher was held not [451] liable. (*r*) A builder, employed to make alterations at a club-house, including the fixing of certain gas-fittings, made a sub-contract with a gasfitter to do this

(*o*) Quarman v. Burnett, 6 M. & W. 499.

(*p*) See Laugher v. Pointer, 5 B. & C. 556, judgment of LITTLEDALE, J.

(*q*) Reedie v. London and North-Western Rail. Co., 4 Ex. 244 ; 20 L. J. 65 Ex.

(*r*) Milligan v. Wedge, 12 A. & E. 737.

work. Through the negligence of the gasfitter, or his servants, the gas exploded, and caused damage. It was held that the builder was not liable to be sued for it. (*s*) Commissioners of navigation, who entered into a contract with a person that he should do certain works, were held not responsible for an injury arising from the imperfect performance of part of those works. (*t*) Again, where certain commissioners contracted with a contractor to pave a district, and the contractor contracted with M. to lay down a certain portion of the pavement, and M.'s workmen left some stones at night, so as to constitute a public nuisance, it was held that a person injured in falling over the stones could not sue the contractor, as the injury was not caused by his workmen. (*u*)

An employer remains liable in the following cases: (*x*)

Case 1.—The employer is liable when he personally interferes with the contractor's workmen. (*y*)

Case 2.—The employer is liable when the act contracted to be done is in itself unlawful; (*z*) for, "if the contractor does that which he is ordered to do, it is the act of his employer. In those cases in which nothing was ordered except that which the party giving the order had a right to order, and the contract was to do what was legal, . . . the employer has been [held] properly not liable for what the contractor did negligently, the relation of master and servant not existing. But where an employer employs a contractor to do that which was unlawful, and an act done in consequence of [452] such employment is the cause of the injury for which an action is brought," (*a*) the employer is liable;

(*s*) Rapson v. Cubitt, 9 M. & W. 710.

(*t*) Allen v. Hayward, 7 Q. B. 960; 15 L. J. 99, Q. B.

(*u*) Overton v. Freeman, 11 C. B. 867; 21 L. J. 52, C. P. See, further, Smith, Master and Servant, 2nd ed., 200, 201.

(*x*) Ellis v. Sheffield Gas Co., 23 L. J. 45, Q. B., judgment of CAMPBELL, C. J.

(*y*) Burgess v. Gray, 5 C. B. 578; 14 L. J. 184, C. P.

(*z*) Peachy v. Rowland, 13 C. B. 182; 22 L. J. 81, C. P.; Ellis v. Sheffield Gas Co., 2 E. & B. 767; 23 L. J. 42, Q. B.

(*a*) Ellis v. Sheffield Gas Co., 23 L. J. 43, Q. B., judgment of CAMPBELL, C. J.

for this is simply the case of one person employing another to do an unlawful act, and it is possible to distinguish it from cases in which an employer has been held not liable for acts done by a contractor not in accordance with his contract. (*b*) A company, for example, contracted with a contractor to lay gas pipes for them in the streets of Sheffield, without having any special powers for that purpose. His workmen left a pile of stones in the street, over which the plaintiff fell, and was injured. The company was held liable to an action by the plaintiff. (*c*)

Case 3.—An employer is liable when the damage complained of arises from the act itself which the contractor is ordered to do.

A railway company was empowered to build a bridge over a river, and employed a contractor, who built a bridge which obstructed the navigation. The plaintiff's vessels were thereby prevented from navigating the river. The company were held liable in an action by the plaintiff. "When one comes to consider the exact distinction between this case [and other cases], there is some little difficulty in deciding it. . . . The real distinction is that where an accident happens by reason of the negligence of the servant of a contractor, so as to cause injury to a third person, that being a matter entirely collateral to that which the contractor had contracted to do, there the liability turns on the relation of master and servant; but where the thing to be done is the thing that causes the mischief, and the mischief can only be said to arise without the direct authority of the person ordering, because the thing has been imperfectly done, [453] in other words, where the injury arises from the imperfectly doing the thing ordered to be done, there the party giving the order becomes responsible. That is the distinction. The present defendants ordered a bridge to be constructed across a navigable river. They were authorized to take land for the purpose, and to throw a bridge across the river, but the bridge was to be so

(*b*) Ibid., judgment of CAMPBELL, C. J., and ERLE, J.
(*c*) Ibid., 2 E. & B. 767, 23 L. J. 42, Q. B.

built as not to interfere with the navigation. If they put a bridge that did interfere with the navigation they would be liable. . . . They ordered the contractor to build the bridge, and when built, it turns out to be ill constructed. Does this appear at all different from the case where a man puts up a structure, upon his land, which structure, when put up, injures some one? . . . The man who orders the structure is liable, and it is no answer to say, I ordered it to be put up in a way which should cause no injury. In that case, as in this, the very thing done, though imperfectly done, has been ordered to be done, and the injury has arisen from the thing so imperfectly done." (*d*) "Where a thing is in itself a nuisance, and must be prejudicial, the party who employs another to do it is responsible for all the consequences that may have arisen. But when mischief arises, not from the thing itself, but from the mode in which it is done, then the person ordering it is not responsible unless the relation of master and servant can be established," (*e*) which, as between the employer and the contractor's servants, it can not be.

Case 4.—The employer is liable when the contractor is entrusted with the performance of a duty incumbent upon the employer, and omits to perform it.

P. employed a coal merchant to put some coals through a trap-door, which P. was bound not to keep open in a way dangerous to the public. Through the negligence of the coal merchant's servants it was left [454] open, and the plaintiff T. fell through it, and was injured. P. was held liable for the injury on the following grounds:(*f*) The rule that an employer is not liable for the acts of the contractor's servants is inapplicable to "cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned. Now, in the present case, the defendant employed the coal

(*d*) Hole v. Sittingbourne Rail. Co., 30 L. J. 86, Ex., judgment of WILDE, B.
(*e*) Butler v. Hunter, 31 L. J. 214, Ex., esp. 217, judgment of POLLOCK, C. B.
(*f*) Pickard v. Smith, 10 C. B., N. S., 470.

merchant to open a trap in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having hereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted, and the fact of his having entrusted it to a person who also neglected it, furnishes no excuse either in good sense or law." (*g*)

P. was empowered by statute to make a drain, and employed a contractor to make it. The ground was filled up so negligently that it subsided and left a hole, into which T. the plaintiff fell, and was injured. It was held by the Queen's Bench, (*h*) that P. was not, and by the Exchequer Chamber (*i*) that he was, liable for the injury; the ground of his liability being that "he was bound to see that the opening should be properly closed, and that the omission to perform his duty [was] not excused by the omission of the agent whom the defendant had employed to act for him." (*k*)

[455] *2nd Question.*—Was the act complained of done in the course of the servant's employment? A master is not responsible for any act done by his servant beyond the scope of his employment, or, as it is sometimes less happily termed, his authority.

"The master is liable, even though the servant, in the performance of his duty, is guilty of a deviation or failure to perform it in the most convenient manner. But if the

(*g*) Ibid., per CURIAM.

(*h*) Gray v. Pullen, 32 L. J. 169, Q. B.

(*i*) Ibid., 5 B. & S. 970, 981; 34 L. J. 265, Q. B.

(*k*) Ibid., 34 L. J. 267, per CURIAM.

Doubts have been expressed as to the correctness of the decision in this case (Wilson v. Merry, L. R. 1, Sc. App. 341). The general principle, whether correctly applied in this instance or not, is, it is conceived, clear. A person who employs a contractor is not the master of the latter's servants, and, therefore, incurs no liability as master. But every one is responsible for anything done, or omitted to be done, under his orders. Hence an employer who, through a contractor, does a thing which is in itself unlawful, or omits to do a thing which he is by law bound to do, is liable to an action by the person injured by his act or omission.

servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master can not be said to do it by his servant, and therefore is not responsible for the negligence of his servant in doing it." (*l*) "The distinction [as applied to a particular case] is this: if a servant, driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which his master will be liable, being an act done in pursuance of the servant's employment. (*m*)

It is often in practice difficult to decide whether the act of a servant has or has not been done in the course of his service, and whether, therefore, an employer is or is not liable for it. The sort of difficulty which arises may be seen from the following examples:

A coachman drove his master, and though ordered not to drive fast, did so; the master was held liable for damage caused through the fast driving; for the coachman was driving for his master, though driv- [456] ing badly. (*n*) P. and Co., an omnibus company, employed A. as the driver of an omnibus. A. had express orders from his employers not to obstruct other omnibuses, or annoy their drivers. A., however, drove his omnibus purposely in front of the plaintiff's omnibus, so as to obstruct it, and thereby caused an accident. Though A. said that he had done it on purpose, and to serve the plaintiff's driver as he had served A., yet it was held that if the driver, being irritated, acted carelessly, wantonly, or maliciously, but in the course of his employment, and in doing that which he believed to be for the interest of his employers, then they were, in spite of their orders,

(*l*) Mitchell v. Crasweller, 13 C. B. 237; 22 L. J. 100, C. P., per MAULE, J.
(*m*) Croft v. Alison, 4 B. & Ald. 590.
(*n*) Smith, Master and Servant, 2nd ed., 191; Sleath v. Wilson, 9 C. & P 612.

responsible for his act; (*o*) for, "if a master employs a servant to drive and manage a carriage, the master is answerable for any misconduct of the servant in driving or managing it, which can fairly be considered to have resulted from the performance of the functions entrusted to him, and especially if he was acting for his master's benefit and not for any purpose of furthering his own interest, or for any motive of his own caprice or inclination." (*p*) "A master," it is added by BLACKBURN, J., "is responsible for the act of his servant, even if it be willful, reckless, or improper, provided the act is the act of the servant in the scope of his employment, and in executing the matter for which he was engaged at the time." (*q*) Where again, A., the conductor of an omnibus, removed T., a passenger, under circumstances which justified him in removing him, but with such carelessness that T. was injured, P., his employer, was held liable; (*r*) "the true criterion being, not whether the act of his servant is a trespass, for in the greater number of [457] actions against masters for acts of their servants, for which the masters are held liable, the servants are trespassers, but whether the act of the servant is willful and malicious, in the latter case the master will not be held liable." (*s*) So a master was held liable for damage caused by the negligent driving of his cart in the city by his servant, although it was proved that the cart ought not, in carrying out his orders, to have been in the city at all. (*t*) An attorney, again, has been held liable to pay costs occasioned by his clerk simulating the seal of the court upon a writ. (*u*)

On the other hand, in the following cases employers have been held not liable, on the ground that the acts of

(*o*) Limpus v. London General Omnibus Co., 32 L. J. 34, Ex. (Ex. Ch.).

(*p*) Ibid., 39, judgment by WILLIAMS, J.

(*q*) Ibid., 41, judgment of BLACKBURN, J.

(*r*) Seymour v. Greenwood, 6 H. & N. 359; 30 L. J. 189, Ex.; 7 H. & N. 355; 30 L. J. 327, Ex. (Ex. Ch.).

(*s*) Seymour v. Greenwood, 30 L. J. 192, Ex., judgment of MARTIN, B.

(*t*) Joel v. Morrison, 6 C. & P. 501. See Whatman v. Pearson, L. R. 3 C. P 422.

(*u*) Dunkley v. Ferris, 11 C. B. 457.

their servants were beyond the scope of their employment.

P.'s servant had finished the business of the day, and without P.'s leave or knowledge, drove P.'s horse and cart to the railway station in order to take a fellow-workman there, and an accident occurred on his way back. P. was held not to be liable. (*x*) For "the servant here did something contrary to, and inconsistent with, his master's business [and] the journey to the station had no connection with it whatever." (*y*) "The servant was acting, and knew that he was acting, contrary to his trust, and to his master's employment."(*z*) P., a wine merchant, sent A., his carman, and also M., his clerk, with a cart, to deliver some wine and to bring back some empty bottles. A., on their return, was induced by M. not to drive home to P.'s offices, but in quite another direction, on business of M.'s. While A. was thus driving, an accident happened through his negligence. It was held that P. was not liable." (*a*) "The true rule," said COCKBURN, C. J., "is that [458] the master is only responsible so long as the servant can be said to be doing the act in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey, which had nothing at all to do with his employment." (*b*) So a master was held not to be liable when his servant, who was authorized to distrain cattle doing damage on his master's land, drove the plaintiff's horses, which were on the highway, on to

(*x*) Mitchell v. Crasweller, 13 C. B. 237; 22 L. J. 100, C. P.
(*y*) Ibid., 22 L. J. 103, Q. B., judgment of MAULE, J.
(*z*) Ibid., 104, judgment of CRESWELL, J.
(*a*) Story v. Ashton, L. R. 4, Q. B. 476.
(*b*) Ibid., 479, per COCKBURN, C. J.

his master's land, and there distrained them, for his act was not within the scope of his authority. (*c*)

Employer not responsible for servant's mistake of law.— It can not be assumed from the mere fact of a master employing a servant, that he has empowered him to do acts which the master himself is not competent to perform. Hence it has been held, that an employer is responsible for the wrongful acts of his servant when they arise from a mistake of fact, but is not responsible for them when they arise from a mistake of law on the servant's part. A., the servant of a railway company, arrested T. under circumstances, which if his view of the facts had been correct would have justified the arrest: [459] the company were held responsible for the assault. (*d*) But where A., the servant of a railway company, took a mistaken view of the law, and hence arrested T. under circumstances which would under no view of the facts have justified the arrest, the company were held not to be liable. (*e*) "In this case an act was done by the station-master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do. Having no power themselves, they can not give the station-master any power to do the act; therefore the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all, has it against the station-master personally, but not against the railway company." (*f*) "If the station-master had made a mistake in committing an act which he was authorized to do, . . . the company would be liable, because it would be supposed to be done by their authority. Where the station-master acts in a manner in which the company themselves would not be authorized to act, and under a

(*c*) Lyons v. Martin, 8 A. & E. 512. As to a servant's authority to contract arising from the course of his employment, see Walker v. Great Western Rail Co., L. R. 2, Ex. 228; Cox v. Midland Counties Rail. Co., 18 L. J. 65, Ex.; 3 Exch. 268. For further examples of a master's liability for torts committed by his servant, see Smith, Master and Servant, 2nd ed., 188–194.

(*d*) Goff v. Great Northern Rail. Co., 30 L. J. 148, Q. B.; 3 E. & B. 672.

(*e*) Poulton v. London and South-Western Rail. Co., L. R. 2, Q. B. 534; 36 L. J. 294, Q. B.

(*f*) Ibid., L. R. 2, Q. B. 540, judgment of BLACKBURN, J.

mistake or misapprehension of what the law is, . . . the rule is very different, and . . . that is the distinction on which the whole matter turns." (*g*) [1]

Exception 1.—Where servant injured by fellow-servant.

A master is not in general liable to an action at the suit of a servant, for an injury done to him by a fellow-servant in the course of their common employment; (*h*) and a person who volunteers to assist a servant in his work is in the same position as a servant in [460] respect of the right of action against the master. (*i*)

"It must be considered as conclusively settled, that one fellow-servant can not recover for injuries sustained in their common employment from the negligence of a fellow-servant, unless such fellow-servant is shown to be either an unfit or improper person to have been employed for the purpose." (*k*) "The principle [on which the exemption of the master rests] is that a servant who engages for the performance of services for compensation . . . does, as an implied part of the contract, take upon himself as between himself and his master, the natural risks and perils incident to the performance of such services, the presumption of law being that the compensation was adjusted accordingly, or, in other words, that these risks are considered in his wages; and that where the nature of the service is such that, as a natural incident to the service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant by his contract takes upon himself as

(*g*) Ibid., judgment of MELLOR, J.

(*h*) Feltham v. England, L. R. 2, Q. B. 33; 36 L. J. 14, Q. B.; Morgan v. Vale of Neath Rail. Co., 33 L. J. 260, Q. B.; L. R. 1, Q. B. 149; 35 L. J. 23, Q. B. (Ex. Ch.); Bullen, Pleadings, 3rd ed., 362; and see Smith, Master and Servant, 2nd ed., 134–153.

(*i*) Degg v. Midland Rail. Co., 1 H. & N. 773; 26 L. J. 171, Ex.; Potter v Faulkner, 1 B. & S. 800; 31 L. J. 30, Q. B. (Ex. Ch.).

(*k*) Feltham v. England, L. R. 2, Q. B. 36. per CURIAM.

[1] Wharton on Agency and Agents, § 541.

between him and his master; (*l*) . . . he does not stand in the relation of a stranger, but is one whose rights are regulated by contract express."

The terms a common employment, or a common service, do not admit of a precise definition, (*m*) and they are used in a wide sense: for there are "many cases where the immediate object on which the one servant is employed is very dissimilar from that in which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must [461] be included in the risks which are to be considered in his wages." (*n*)

The rule is not altered by the fact that the servant guilty of negligence is a servant of superior authority whose directions the other is bound to obey; (*o*) and it applies to cases where the immediate object on which one servant is employed is very dissimilar from that on which the other is employed. (*p*) On the other hand, the service must be common, that is, each of the servants must be employed by the same master; (*q*) and the master is not exempt from liability if the injury, even though immediately caused by a fellow-servant, is fairly imputable to the conduct of the master himself. (*r*) [1]

(*l*) Morgan v. Vale of Neath Rail. Co., 33 L. J. 264, Q. B., judgment of BLACKBURN, J.

(*m*) See Bartonshill Colliery Co. v. Maguire, 3 McQ. 300.

(*n*) Morgan v. Vale of Neath Rail. Co., 33 L. J. 265, Q. B., judgment of BLACKBURN, J.; Tunney v. Midland Rail. Co., L. R. 1, C. P. 291.

(*o*) Feltham v. England, L. R. 2, Q. B. 33.

(*p*) Morgan v. Vale of Neath Rail. Co., L. R. 1, Q. B. 149.

(*q*) Warburton v. Great Western Rail. Co., L. R. 2, Ex. 30.

(*r*) Morgan v. Vale of Neath Rail. Co., 33 L. J. 265, Q. B., judgment of BLACKBURN, J.

[1] "The master is bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief; but the law does not imply, from the mere relation of master and servant, an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself." If the servant sustains injury in the course of his employment, from the

Exception 2.—Where the master is compelled to employ a particular person.

A master is not liable for the acts of servants when he is compelled by statute to employ a particular per-

negligence of the master, the latter will be responsible in damages. And this negligence may consist in the employment by him of unfit and incompetent co-servants; Sizer v. Syracuse, 7 Lans. 61; or in furnishing for work to be done, or for the use of the servant, machinery or other improper implements or things, improper and unsafe for the purposes to which they are to be applied; Id.; West v. St. Louis, &c., R. R. Co. 63 Ill. 545. In the latter case, a railway company chartered by the legislature contracted with certain parties to construct its road and its appurtenances. These contractors, through their superintendent, hired the plaintiff to work upon a freight-house they were building for the company. A poisonous mixture, in which corrosive sublimate was an ingredient, was applied to the timber to prevent decay. The plaintiff was injured by breathing the exhalations of this substance, and by handling the timber to which it had been applied. Held, that the railway company was not liable to the plaintiff for the injury he received, but that the contractors were solely responsible, and were not, in this respect, the servants of the company. West v. St. Louis, Vandalia, and Terre Haute Railroad Co., Ill. 545. Where the wrongful act is done by contractors or lessees of a chartered company in pursuance of the special powers and privileges conferred upon the company by its charter, and but for such charter they would have no right to prosecute the particular business, such contractors or lessees, as to third parties who may be injured by their acts, will be regarded as the servants of the company acting under its discretion, and the company will be held liable for any abuse of such of its privileges by its contractors or lessees. But it seems the contractors themselves are servants of the company. Chicago, &c., R. R. Co. v. McCarthy, 20 Ill. 385; Stone v. Cheshire R. R. Co., 19 N. H. 427; Carman v. Steub., &c., R. R. Co., 4 Ohio St. § 399; Hofnagle v. N. Y., &c., R. R. Co., — N. Y. 608; Cleghorn v. N. Y., &c., R. R. Co., 56 Id. 44; but the master is not liable to his servant for damages sustained by the negligent act of a fellow-servant while engaged in the same general employment, unless the master was negligent in the selection of the servant at fault; Hogan

son, (*s*) the ground of his exemption being, independently of statutory provisions, that where one man is compelled by law to employ another, as where under various Mer-

(*s*) Smith, Master and Servant, 2nd ed.. 205, 206.

v. Central P. R. R. Co., 49 Cal. 128; and see Gibson v. Pacific R. R. Co., 46 Mo. 163; Wonder v. Baltimore, &c., R. R. Co., 32 Md. 411; and whether the injury from the fellow-servant's act is the result of the master's negligence in employing an incompetent servant is a question for the jury; Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; and see Connolly v. Davidson, 15 Minn 519; Harper v. Indianapolis, &c., R. R. Co., 47 Mo. 567; Davis v. Detroit, &c., R. R. Co., 2 Mich. 105; and if the servant's negligence contribute to the injury, he can not recover; Johnson v. Bruner, 61 Pa. St. 58; and see Spelman v. Fisher, &c., Works, 56 Barb. 151. Where an employee was injured by the falling of a hoisting apparatus, held, that the liability of the defendant depended upon three facts: 1. That the method of attaching the hoisting rope was defective and unsafe, and that the injury was caused by the defect; 2. That the defendant knew, or ought to have known, of the defect; 3. That the plaintiff did not know of it, and had not equal means of knowledge. Malone v. Hawley, 46 Cal. 409. It is competent for a jury in assessing damages to an employee resulting from negligence of the employer, to consider what, before the injury, was the health and physical ability of the plaintiff to maintain himself and family as compared with his condition in such particulars afterwards; his loss of time, and how far the injury was permanent in its character and results, as well as the physical and mental suffering he sustained by reason of the injury; and they should allow such damages as they think will fairly and justly compensate him for all loss and injury sustained. But the jury can not consider the plaintiff's "condition in life," whether he is rich or poor. Id. Plaintiff, while employed upon a barge which was being used in lightering a steamship, was injured through the negligence of one engaged upon the steamship in discharging her cargo. In an action to recover for the injury, defendant's answer admitted that at the time of the accident defendant owned and had the control and management of the steamer; the barge was not owned by defendant, and plaintiff was employed and paid by its master. Held, that the proof, together with the admission in the answer, was sufficient to authorize the jury to find that the man who caused the injury was a servant of defendant, and

chant Shipping Acts, the owner of a ship is compelled to take a particular pilot, viz., the first one who offers himself, he is not liable for damage caused by the person

working for it at the time; that he and plaintiff were not fellow-servants within the meaning of the rule exempting an employer from liability for an injury to one employee by the act of another; and that said rule, therefore, furnished no objection to the maintenance of the action. Svenson v. Atlantic, &c., M. Steamship Co., 57 N. Y. 108. In an action brought by a servant against his master to recover for personal injuries received by him in breaking and falling through a floor in his master's shop, over which it was his duty to pass, it appeared that he knew that the floor was decayed, and that there were holes in it; but it did not appear that he could have ascertained that the place where he broke through was dangerous without examining parts of the floor not open to his inspection. Held, that the court could not say that he was guilty of negligence, and that the question was for the jury. Huddleston v. Lowell Machine Shop, 282. While a master is liable to a servant for injuries resulting from the negligence of a fellow-servant who has been charged with the performance, in place of the master, of duties owed by the master to the servant, where the negligence relates to the performance of those duties, he is not liable for the negligence of a competent fellow-servant who does not thus stand in the place of the master, although he may have some authority and power of direction over the injured servant. Hoffnagle v. New York, &c., R. R. Co., — N. Y. 608. Where the servants of a railroad company, while in the discharge of their duties, pervert the appliances of the company to wanton and malicious purposes, to the injury of others, the company is liable for such injuries. Chicago, Burlington, & Quincy Railroad Co. v. Dickson, — Ill. 151. If a servant of a railroad company be injured through the incompetency and unskillfulness of a fellow-servant, or in consequence of defects in machinery or track, and the company be guilty of negligence in the employment and retention of such agent, or in the construction and repair of its machinery and track, it is liable in damages. Chicago & Alton Railroad Co. v. Sullivan, Admx., Id. 293; and habitual intemperance of a conductor, under circumstances bringing knowledge thereof to his employers, is sufficient to render them liable for injury resulting therefrom; Id.; but see Chapman v. Erie R'y, — N. Y 579. A master was held liable

employed. (*t*) When the selection of the person to be employed is left to the master, he is liable, although his choice may be limited by law to a particular class. (*u*)

(*t*) See General Steam Nav. Co. v. British and Colonial Steam Nav. Co., L. R. 4, Ex. 238 (Ex. Ch.), esp. judgment of BYLES, J., 246. Compare Smith, Master and Servant, 2nd ed., 205, 206; Lucey v. Ingram, 6 M. & W. 302; Hammond v. Rogers, 7 Moo. P. C. 160; Conservators of the Thames v. Hall, L. R. 3, C. P. 415.

(*u*) Martin v. Temperley, 4 Q. B. 298; 12 L. J. 129, Q. B.

for medical attendance for his servant in Rice v. Boshenny, 2 Houst. 74; but the contrary was held in Baltimore, &c., R. R. Co. v. State, 6 Am. Ry. Reps. 276. For the negligence, however gross or culpable, of a servant while engaged in the business of the master, the latter is not liable in punitive damages, unless he is also chargeable with gross misconduct. Ordinary negligence will not suffice to impose such a liability; it must be reckless, and of a criminal nature, and must be clearly established. Such misconduct may be established, however, by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent, or from bad habits unfit for the position he occupied. Cleghorn v. N. Y. C. and H. R. R. R. Co., 56 N. Y. 44. A master is not liable, in exemplary damages, for the act of his servant where the plaintiff would not have been entitled to recover such damages had the suit been against the servant; Townsend v. N. Y. C. and H. R. R R. Co., Id. 295; nor where he would not be liable if he had done the act himself; Russell v. Irley, 13 Ala. 131; or where he did not authorize the act; Harris v. Nicholas, 4 Munf. 483; Thames Steamboat Co. v. Housatonic R. R. Co., 24 Conn. 40; Church v. Mansfield, 20 Id. 20; Id. 284; Evansville, &c., R. R. Co. v. Baum, 26 Ind. 70; McCoy v. McKowen, 26 Miss. 487; Wesson v. Seaboard, &c., R. R. Co., 4 Jones (N. C.) L. 379; Yerger v. Warren, 31 Pa. St. 319; nor will the master be liable for acts of his servant who departs from his master's instructions; Oxford v. Peter, 28 Ill. 434; unless he is aware of such departure; Elder v. Bemis, 2 Metc. 599; or out of the course of his employment; Foster v. Essex Bank, 17 Mass. 479; Kerns v. Piper, 4 Watts, 222; Wilson v. Peverly, 2 N. H. 548; Aycrigg v. New York, &c., R. R. Co., 30 N. J. L. 460. The principle as stated above has not prevented considerable confusion in the cases. In Laning v. New York Central R. R.

Exception 3.—Where the employer is a public officer [462] under government.

Public officers under government (*e. g.*, the postmaster-general) are not responsible for torts committed by their

Co., 49 N. Y. 521, it was held that the duty of the master to the servant, and the implied contract between them, is that the master shall furnish proper, perfect, and adequate machinery or other materials and appliances necessary for the work which the servant is to do; and that he shall employ competent and skillful fellow-servants, or shall use all due and reasonable care to employ such; and that this duty and contract must be affirmatively and positively fulfilled by the master. And the court of appeals sustained, with one judge dissenting, a verdict for the plaintiff upon the following facts: Plaintiff was an employee of the defendant's railroad company. He worked, with others, under the directions of Westman, defendant's foreman. Westman directed Foreman and Churchill, two lads, to erect a scaffold, and they did so, unskillfully, and of poor materials. Plaintiff, while working on this scaffold, sustained injuries by its fall. The foreman, Westman, was originally competent and skillful, but during his employment by defendant had acquired habits of intemperance in strong drink, which became known to Coleby, defendant's hiring agent; the plaintiff himself knew the same fact, but he did not know who built the scaffold, or how it was built. There was plenty of good material furnished by defendant for building scaffolds. "The question of contributory negligence on the servant's part," said the opinion, "was one for the jury, with which the court could not have to do." As to the intemperance of Westman, the court said: "The testimony does not show directly, though it is an inference which a jury might make fairly, that his condition in that respect was a cause of injury to the plaintiff; for they might well infer that if his faculties had been without confusion from strong drink he would not have put these lads, deficient in judgment and strength, to a work requiring discretion and power, or would have inspected the result of their work before using it." Previously, the same court, in Wright v. N. Y. Central R. R., 25 N. Y. 565, had substantially held that the injuries must positively appear to have resulted from the unskillfulness, incompetency, or imprudence of the servant, and rejected the idea of an inference in the absence of such positive proof. In Flike v. Boston and

servants. (*v*) The cases in which public officers have been held not liable for the torts of their subordinates were decided upon the ground, that the government was the

(*v*) Lane v. Cotton, 1 Salk. 17; 1 Ld. Raym. 646; Whitfield v. Lord le Despenser, 2 Cowp. 754; Nicholson v. Mouncey, 15 East, 384. Nor is there any remedy whatever against the Crown. See Canterbury's Case, 1 Phil. 306.

Albany R. R. Co., 53 Id. 549, plaintiff's intestate was a fireman upon a freight train on the defendant's road; his train was run into by some cars which became detached from another freight train ahead of his, and he was killed. The first train had but two brakemen, when it should have had three, the third one oversleeping and failing to accompany the train, and the train being sent out by the train-dispatcher with only two brakemen; the lack of the third brakeman caused the accident. A verdict for the plaintiff was sustained by one vote. The ground of dissent of the minority is stated by Judge FOLGER (in Malone v. Hathaway, referred to below) to have been, that the train-dispatcher was not (as the majority held) such an agent of the company as to make the latter responsible for his negligence. Again, in Corcoran v. Holbrook, 59 N. Y. 518, the defendants operated a cotton-mill, to the management of which they gave no personal attention, but intrusted it entirely to a general agent, who had full power. In the mill was an elevator, which for upwards of thirty years had been used by the superintendents, bosses, and employees of the mill in passing from one floor to another of the mill while engaged in work there, and this to the knowledge of their superiors and bosses, and that the plaintiff had been accustomed so to ride. The right of the plaintiff to use the elevator to pass to the upper floor is conceded in the opinion of the supreme court, and the conclusion of the referee that she was not guilty of any negligence in so doing is undisturbed. The sole ground of reversal was that the defendants were not liable for the negligence of their general agent in omitting to repair the broken chain, after notice to him that it was unsafe, and that unless repaired some of the employees would get hurt. The defendants, who operated the mill at the time of the injury, gave no personal attention to conducting the mill, but it was managed by a general agent, who had general charge of the mill, machinery, and operatives, with power to purchase all supplies, and hire and discharge operatives. Said the court: "It is evident that this general agent was not a mere fellow-servant of the plaintiff, who was a common hand in the

principal and the defendant merely the servant, (*x*) and that an action must be brought either against the principal or against the immediate actors in the wrong: (*y*) and

(*x*) The Mersey Docks Co. v. Gibbs, L. R., 1 H. L. 111, per BLACKBURN, J.
(*y*) Story, Agency, s, 313. See, further, as to this, Subordinate Rule, *post*.

mill, but that he was charged with the performance of the duties which the defendants owed to the hands employed in the mill. There was no other person to discharge those duties, and the defendants could not, by absenting themselves from the mill and refraining from giving any personal attention to its conduct, but committing the entire charge of it to an agent, exonerate themselves from those duties, or from the consequences of a failure to perform them. It was the duty of the defendants towards their employees to keep the elevator in a safe condition, and to repair any injury to it which would endanger the lives or limbs of their employees, who were lawfully and properly, and in the performance of their functions, in the habit of using it. That duty they delegated to their general agent. As to acts which a master or principal is bound as such to perform toward his employees, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and liable for the manner in which they are performed. This rule is as applicable to individuals as to corporations, and requires us to sustain the conclusion of the referee, that the defendants were responsible for the neglect of their general agent, he having the means and power to keep the elevator in repair, and that notice to such general agent was notice to the defendants that the elevator was out of repair, and the defendants were consequently guilty of gross negligence in omitting to repair it." In Malone v. Hathaway, not yet reported, but referred to in the Albany Law Journal, vol. 13, p. 174, the same court reversed a verdict for plaintiff where deceased, an employee in defendant's brewery, was killed by the fall of a mash-tub, which was proved to have been substantially re-built and perfectly safe when deceased entered the employment, and about eleven months before; and where the failure to look to the supports afterwards was the fault of Bagley, a co-servant, foreman of carpenters, against whose competency and skill nothing was alleged. Distinguishing the case from Laning v. New York Central R. R. Co., and Flike v. Boston and Albany R. R. Co. cases (cited *supra*), on the ground that those were ases of corporations, which can only act by and through

can not be maintained against an intermediate subordinate under whom the actual wrong-doer is employed; and this holds although there is no remedy in the case of torts committed by persons employed by government against the ultimate principal, *i. e.*, the Crown. (*z*)

It was at one time thought (*a*) that this exception protected trustees or corporations for the gratuitous

(*z*) Canterbury's Case, 1 Phil. 306.

(*a*) Metcalfe v. Hetherington, 24 L. J. 314, Ex.; 11 Ex. 257; 5 H. & N. 719; Holiday v. St. Leonard's, Shoreditch, 30 L. J. 361, C. P.; 11 C. B., N. S. 192.

servants; and from the case of Corcoran v. Holbrook, 59 N. Y. 517, on the ground that in the latter the defendants were absent, and had delegated all their powers and devolved all their duties upon a general agent or superintendent. And see Brickner v. New York, &c., R. R. Co., 49 N. Y. 672; Holmes v. Clark, 10 Wend. 405; Hoey v. D. & B. R. R. Co., 8 Id. 930; Hoffman v. New York, &c., R. R. Co., 55 N. Y. 608; Keegan v. West. R. R. Co., 8 Id. 175; Noyes v. Smith, 28 Vt. 59; Ford v. Fitchburg R. R. Co., 110 Mass. —; Snow v. Housatonic R. R. Co., 8 Allen, 441. As to when the negligence of an agent of the master is not negligence of the master, see Faulkner v. Erie Ry. Co., 49 Barb. 328; Albro v. Agawam Canal Co, 6 Cush. 75; Hart v. Vermont, &c., Ry. Co., 32 Vt. 473; Wright v. New York, &c., R. R. Co., 25 N. Y. 562; Warner v. Erie Ry. Co., 39 Id. 468. As to contributory negligence on the part of the servant, see Spooner v. Brooklyn City R. R. Co., 31 Barb. 419; Nicholson v. Erie Ry. Co., 41 N. Y. 528; Russell v. Hudson River R. R. Co., 17 Id. 137; Sprong v. Boston, &c., R. R. Co., 60 Barb. 30; Dougan v. Champ., &c., Co., 6 Lans. 430; Stewart v. President, &c., 12 Allen, 58; Connolly v. Davidson, 15 Minn. 519; Wonder v. Baltimore, &c., R. R. Co., 32 Md. 411; Harper v. Indianapolis, &c., R. R. Co., 47 Mo. 567; Davis v. Detroit, &c., R. R. Co., 20 Mich. 105; Lalor v. Chicago, &c., R. R. Co., 52 Ill. 401; Chicago, &c., R. R. Co. v. Murphy, 53 Id. 336; and, generally, Perry v. March, 25 Ala. 657; McGlynn v. Brodie, 31 Cal. 376; Corbin v. American Mills, 27 Conn. 274; Hayden v. Smithville, &c., Co., 29 Conn. 548; Pensacola, &c., R. R. Co. v. Nash, 12 Fla. 497; Indianapolis, &c., R. R. Co. v. Love, 10 Ind. 554; Carey v. Courcelle, 17 La. Ann. 108; Buzzell v. Laconia Co., 48 Me. 113; Harrison v. Central R. R. Co., 31 N. J. L. 293; Johnson v. Bruner, 6 Phil. (Pa.) 554; Haines v. East Tennessee, &c., R. R. Co., 3 Coldw. 222.

performance of public works, from liability to be sued for the torts of their servants; but it appears now settled, that the principle on which a private person or company is liable for damages occasioned by the neglect of servants applies to commissioners, trustees, corporations, or others, entrusted with the performance of public works, even though no gain is derived from the works by the commissioners, &c., either in their individual or in their corporate capacity. (*b*)

RULE 103.—A servant or other agent is [463] liable to the person wronged for acts of misfeasance, or positive wrong, in the course of his employment, but not for acts of non-feasance or mere omission. (*c*)

All persons concerned in a wrong are liable to be charged as principals. "The warrant of no man, not even the king himself, can excuse the doing of an illegal act, for although the commanders are trespassers so are also the persons who did the fact;" (*d*) and "no authority whatsoever from a superior can furnish to any party a just defense for his own positive torts or trespasses, for no man can authorize another to do a positive wrong." (*e*) Hence, a servant who commits a trespass, or who injures the plaintiff by negligent driving, or by a fraud, (*f*) is liable to be sued by the person injured, and the agent who actually does the wrong may be liable, though his employer (*e. g.*, as being a public officer under government) can not be sued. If goods are delivered by T. to P. to keep them, and P. in his turn delivers them to A. to keep for the use of T., and A. wastes or destroys them, T. may sue A., although the bailment was not made to

(*b*) Mersey Docks Co. v. Gibbs, L. R. 1. H. L. 93; 35 L. J. 225, Ex. (H. L.).

(*c*) See Smith, Master and Servant, 2nd ed., 241, and following Story, Agency, s. 308–312.

(*d*) Sands v. Child, 3 Lev. 352; but see Buron v. Denman, 2 Ex. 167.

(*e*) Story, Agency, s. 309.

(*f*) Smith, Master and Servant, 2nd ed., 245, 246. Compare Story, Agency, s. 310.

A. by T., for A. is a wrong-doer. (*g*) If, again, an auctioneer is employed by a sheriff to sell at an auction goods which the sheriff had taken in execution, which were not the property of the execution debtor, the auctioneer, if he sells them, is equally liable to an action with the sheriff. (*i*) "The point [in such a case] is whether [464] [the servant] is not a tort-feasor; for if he be so, no authority he can derive from his master can excuse him from being liable. . . . The act of selling the goods is the conversion, and whether to the use of himself or another it makes no difference." (*k*) Servants, therefore, have often been held liable in trover for the conversion of goods, though the act was done for their employer's benefit. (*l*) P. purchased goods under circumstances which made him guilty of a conversion. The goods were delivered to A., P.'s clerk, who sent them to P., who was in America. A. was held liable for an act of conversion. (*m*) "A person is guilty of conversion who intermeddles with any property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. . . And the court is governed by the principle of law, and not by the hardship of any particular case, for what can be more hard than the common case in trespass where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master can not satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and, what is still more, that he shall not recover contribution?" But the same act which would amount to conversion if committed by the master need not necessarily bear this character when done by the servant. Where, for example, the latter refuses to deliver up goods received from his master without his master's orders. Such refusal has

(*g*) Story, Agency, s. 311.
(*i*) Farebrother v. Ansley, 1 Camp. 343.
(*k*) Perkins v. Smith, 1 Wilson, 328, per LEE, C. J.
(*l*) Ibid.
(*m*) Stephens v. Elwall, 4 M. & S. 259, 261, judgment of ELLENBOROUGH C. J.

been held not to amount to a conversion by the servant. The distinction is that if the servant refuse to give up the goods to the rightful owner, and rely on his master's title, he is liable in trover; but if he merely gives a qualified refusal and refers to his master, he is not liable. (*n*)

A servant or agent is not liable to third persons [465] for the mere non-performance of his duties as such agent. "Non-feasances or mere neglects in the performance of duty . . . must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other, and no man is bound to answer for such violations of duty or obligation except to those to whom he has become directly bound or amenable for his conduct." (*o*) The distinction, however, between acts which are mere neglects of an agent's duty to his principal and acts which are wrongs towards third parties is a very fine one. If, for example, the servant of a carrier negligently loses a parcel of goods entrusted to him, the carrier, and not the servant, is responsible to the bailor or owner of the goods. (*p*) But if the servant were willfully to destroy them he would be liable to the owner. (*q*)

In determining the liability of a servant towards a third party the question to be answered is, it is conceived, has the act of the servant merely violated a duty he owes to his master, or is it also an infringement of the rights of the third party? In the former case he can not, in the latter he can, be sued by such party. (*s*)

(*n*) Lee v. Robinson, 25 L. J. 249, C. P.; Lee v. Bayes, 18 C. B. 599, 607. Compare Alexander v. Southey, 5 B. & Ald. 247, with Wilson v. Anderton, 1 B. & Ad. 450; Smith, Master and Servant, 2nd ed., 244-246.

(*o*) Story, Agency, s. 309. This is in reality an application of the principle that no one can sue for the breach of a contract except the party with whom it is made. See Rule 10.

(*p*) Lane v. Cotton, 12 Mod. 488.

(*q*) Compare Story, Agency, ss. 310, 311.

(*s*) It has been suggested that a servant is not liable for an injury to his fellow-servant in the course of their common employment (Southcote v. Stanley, 1 H. & N. 247, 25 L. J. 339, Ex. See 25 L. J. 340, Ex., judgment of Pollock, C. B. Compare Albro v. Jaquith, 4 Gray, Rep. (Amer.) 99; Farwell v. Boston and Worcester Rail. Co., 4 Metc. (Amer.) 49). But the correctness of this view is most doubtful.

Can the principal and agent be jointly sued?—A master and servant can certainly be sued jointly when they are liable in the character of joint wrong-doers, *e. g.*, [466] where the servant trespasses by order of the master. (*x*) The preponderance of authority is further in favor of their liability to a joint action where the master is responsible, not as a joint wrong-doer, but because his servant committed the wrong complained of in the course of his employment. (*y*) Thus a railway company and their manager have been jointly sued for malicious prosecution. (*z*) So a clerk of commissioners, a contractor, and the contractor's servant, have been sued jointly for damage caused by opening a ditch across a highway. (*a*) Still it has been doubted on high authority whether a master and servant can be sued jointly, where the master is liable only on account of his position as master. (*b*)

SUBORDINATE RULE.

An action for tort may be brought either against the principal or against the immediate actor in the wrong, but can not be brought against an intermediate agent. (*c*)

If P. employs X. to act as manager of his business, and X. hires A. who commits a wrong against T., T. can, as a general rule, either sue P. on the ground of the wrong being committed by A. in the course of his employment, or sue A. as being the actual wrong-doer. But he can not sue X., who is neither A.'s principal nor himself the doer of the wrong.

"If an action were brought by the owner of goods

(*x*) See *ante*.

(*y*) See *ante*.

(*z*) Stevens v. Midland Rail. Co., 23 L. J. 328, Ex.; 10 Ex. 352.

(*a*) Hall v. Smith, 2 Bing. 156.

(*b*) Compare Michael v. Alestree, 2 Lev. 172; Whitamore v. Waterhouse, 4 C. & P. 383; Parsons v. Winchell, 5 Cush. (Amer.) 592, where all the cases are reviewed.

(*c*) Story, Agency, s. 313; Mersey Docks Co. v. Gibbs, L. R. 1, H. L. 93; 35 L. J. 225, Ex. (H. L.).

against the manager of the goods traffic of a railway company, for some injuries sustained on the line, it would fail, unless it could be shown that the damage were done by his orders or directions; for the action must be brought either against the principal or against the [467] immediate actors in the wrong. . . . The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury, from the parish ways being out of repair, though no action can be brought against his principals, the inhabitants of the parish." (*d*)

The masters of ships, however, although servants of the owners, are responsible for the negligence of subordinate officers, and others employed by them. (*e*)

(*d*) Mersey Docks Co. v. Gibbs, L. R., 1 H. L. 111 per BLACKBURN, J. See Young v. Davis, 7 H. & N. 760; 31 L. J. 250, Ex.

(*e*) Story, Agency, s. 315.

CHAPTER XXVII.

PARTNERS.

RULE 104.—One, or any, or all of the partners in a firm, or members of an unincorporated company, may be sued jointly for a wrong committed by the firm or company.

A firm is nothing more than the persons who at any given moment compose it. (*a*) Hence, for any wrong which can be considered the act of the firm, the members X., Y., and Z., are collectively and individually (*b*) liable to be sued. An act may be the act of the firm, either because it is done by one of the partners within the scope of his partnership business, that is, as agent of the firm; or because it is done by a person (*e. g.*, a servant), in the employment of the firm. The rule that all or any of the partners may be sued holds good even when the tort complained of is in no other sense the act of the firm than as being the act of a servant of the firm in the course of his employment. If, for example, M., the servants of the partners X., Y., and Z., in the course of his service injures A. through his negligence or fraud. (*c*) A. can sue X. alone, and X. can not object to the non-joinder of Y. and Z. (*d*)

[468] The principle that there is no contribution between wrong-doers (*e*) does not apply to a person made a

(*a*) See as to nature of partnerships and unincorporated companies, *ante*.

(*b*) Rule 98.

(*c*) Rapp v. Latham, 2 B. & A. 795; Lovell v. Hicks, 2 Y. & C. (Ex.) 46, 481; 1 Lindley, Partnership, 2nd ed., 319, 320. See *ante*.

(*d*) Mitchell v. Tarbutt, 5 T. R. 649; Ansell v. Waterhouse, 6 M. & S. 385; 1 Lindley, Partnership, 2nd ed,, 488, 489.

(*e*) See *ante*.

wrong-doer by inference of law only. X. therefore, in the supposed case, could recover from Y. and Z. their share of the damages which he was compelled to pay A. (*f*)

Exception.—Where partners sued as co-owners of land. (*g*

(*f*) Merryweather v. Nixan, 2 Smith, L. C., 6th ed., 481, 486; Pearson v. Skelton, 1 M. & W. 504; Adamson v. Jarvis, 4 Bing. 66.

(*g*) 1 Lindley, Partnership, 2nd ed., 489.

CHAPTER XXVIII.

CORPORATIONS. (*a*)

RULE 105.—A corporation or incorporated body can be sued for torts. (*b*)

Corporations are liable to be sued for any wrong which they can commit.

"There are, of course, some offenses for which a corporation can not be sued; for instance, murder, for a corporation can not commit murder; nor can they be sued for immoral crimes, such as adultery, nor for corruption; though the members individually might be sued." (*c*) These offenses are, it is true, rather crimes than torts; but there are some wrongs, *e. g.*, seduction, of which a corporation must be manifestly incapable. It was at one time thought (*d*) but, it is conceived, erroneously (*e*) that corporations could not commit torts, such, *e. g.*, as malicious prosecution, or libel, involving the existence of malice.

[471] A corporation or company, being an abstract thing, must always act through agents, (*f*) and are

(*a*) A corporation, or incorporated company, can sue for wrongs to itself by its corporate name in the same manner as other persons. There is nothing to prevent a corporation from suing one of its own members. (Metropolitan Saloon Omnibus Co. v. Hawkins, 28 L. J. 201, Ex.; 4 H. & N. 87.)

(*b*) As to nature of corporations, see *ante*.

(*c*) Metropolitan Saloon Omnibus Co. v. Hawkins, 28 L. J. 202, Ex.; per POLLOCK, C. B.

(*d*) Stevens v. Midland Rail. Co., 10 Ex. 252; 23 L. J. 328, Ex.; Bullen, Pleadings, 3rd ed., 300.

(*e*) Green v. London General Omnibus Co., 7 C. B., N. S., 290; 29 L. J. 13, C. P.; Limpus v. London General Omnibus Co., 1 H. & C. 526; 32 L. J. 34, Ex. (Ex. Ch.); 1 Lindley, Partnership, 2nd ed., 306.

(*f*) Bullen, Pleadings, 3rd ed., 300; National Exchange Co. of Glasgow v. Drew, 2 McQ. 103, esp. judgment of Lord CRANWORTH, p. 123–127; and see Ferguson v. Wilson, L. R. 2, Ch. App. 89.

liable for the negligence of their servants committed by them in the course of their employment, (*g*) and it has therefore been held that the Bank of England was liable for a wrongful detention of goods by the bank's servants. (*h*) It is, however, essential, in an action against a corporation, as in one against any other principal, to show that the tort sued for was either authorized or ratified by the corporation, or within the scope of the servant's employment. (*i*)

Can a corporation be sued for fraud?—There is good authority for the statement that "an action for fraud can not be maintained against a corporation." (*j*)

"The true principle is, that these corporate bodies [viz., companies], through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds; but that they can not be sued as wrong-doers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." (*k*) "The principle (of making a company responsible for the misrepresentations of the directors) can not be carried to the wild length that I have heard suggested; namely, that you can bring an action against the company upon the ground of deceit, because the directors [472] have done an act which might render them liable to such an action. That I take not to be the law of the land, nor do I believe that it would be the law of the land if the directors were the agents of some person not

(*g*) Mersey Docks Co. v. Gibbs, L. R. 1, H. L. 93; 35 L. J. 225, Ex. (H. L.).

(*h*) Yarborough v. Bank of England, 16 East, 6.

(*i*) Stiles v. Cardiff Steam Boat Co., 33 L. J. 310, Q. B.; 1 Lindley, Partnership, 2nd ed., 305, 306.

(*j*) Bullen, Pleadings, 3rd ed., 300; Western Bank of Scotland v. Addie, L. R. 1, Sc. App. 145.

(*k*) Western Bank of Scotland v. Addie, L. R. 1, Sc. App. 167, judgment of Lord CRANWORTH.

a company. The fraud must be a fraud, that is, either personal on the part of the individual making it, or some fraud which another person has impliedly authorized him to be guilty of. (*l*) "The distinction to be drawn from the authorities, which is sanctioned by sound principle, appears to be this. When a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser can not be held to his contract, because a company can not retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action can not be maintained against the company, but only against the directors personally." (*m*)

There is, however, nearly equally good authority for the statement that a corporate body can be sued for the fraud of their agent committed in the course of his employment. The Court of Exchequer Chamber have recently held a joint-stock banking company directly liable for the fraud of their manager, (*n*) and have thus laid down the law. "It is said, [on behalf of the defendant] if it be established that the bank are answerable for this fraud, it is the [473] fraud of the manager, and ought not to have been described as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in case for fraud, or whether, under the circumstances, money having been actually procured for and paid into the bank which ought to have got into the plaintiff's

(*l*) New Brunswick Co. v. Conybeare, 9 H. L. C. 711, 739, per Lord CRANWORTH.

(*m*) Western Bank of Scotland v. Addie, L. R. 1, Sc. App. 157, 158, per CHELMSFORD, Ch.

(*n*) Barwick v. English Joint Stock Bank, L. R. 2, Ex. 259 (Ex. Ch.).

hands, the count for money had and received is not applicable to the case. I do not discuss that question, because at common law no such difficulty as here suggested is recognized. If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action." (*o*)

The law on the point under consideration must be considered as open to doubt, but may probably (it is submitted), be still summed up as follows:

"So long as it is law that a principal may be bound by the unauthorized act of his agent, (*p*) so long it will be impossible to deny that companies may be affected by the false and fraudulent representations of their directors, although they have no authority to promulgate falsehoods. The falsehood may be an excess of authority, but it does not therefore follow that it is imputable only to those who utter it: (*q*) and it is submitted that the question whether a false and fraudulent statement can be regarded as the statement of a company, must be answered in the affirmative, if the statement in question is made by an agent of the company, if it relates to a matter as to which he is its agent, and if it is made in the course, and as part, of the business which he is appointed to transact for the company." (*q*) (*r*)

(*o*) Barwick v. English Joint Stock Bank, L. R. 2, Ex. 266, judgment of the Exchequer Chamber delivered by WILLES, J.

(*p*) Foster v. Green, 7 H. & N. 881; 31 L. J. 158, Ex.

(*q*) Burnes v. Pennell, 2 H. L. C. 497; Deposit and General Life Assurance Co. v. Ayscough, 6 E. & B. 761; Nicol's Case, 3 De G. & J. 387; Blake's Case, 34 Beav. 639.

(*r*) 1 Lindley, Partnership, 2nd ed., 326. See, further, Cox, Joint Stock Companies, 7th ed., 38, 39.

CHAPTER XXIX.

INFANTS. (*a*)

RULE 106.—An infant may be sued for torts committed by him. (*b*)

Infancy is no defence to an action for tort, *e. g.*, for an assault, a trespass, &c.

Torts founded on contract. (*c*)—An infant can not be made liable for what is really a breach of contract by the fact of the action being brought in the form of an action for tort. Whether, therefore, an infant is or is not liable in an action in form ex delicto, depends in each case, not upon the form, but upon the true nature of the action. He is liable, if it be in reality an action for tort; he is not liable, if it be in substance an action for breach of contract. Thus an infant can not be charged on the custom of the realm as a common innkeeper; he can not be sued for breach of duty as a carrier; nor, it is said, can he be made liable for the conversion of goods, if the cause of action is grounded on a matter of contract with the infant, and constitutes a breach of contract as well as a tort. (*d*) On the same principle, where an infant hired a mare, and injured it by immoderate riding, it was held that the plea of infancy was an answer to the [475] action, the action being founded on a contract. (*e*) But where an infant hired a horse, on the terms

(*a*) An infant has exactly the same rights of suing as are possessed by persons not infants. He sues in the name of his next friend; but this is a mere matter of form.

(*b*) And, of course, therefore, a person who has attained his majority may be sued for torts committed during infancy.

(*c*) See *ante*.

(*d*) Manby v. Scott, 1 Lev. 4; 2 Smith, L. C., 6th ed., 396.

(*e*) Jennings v. Cundall, 8 T. R. 335.

that it was to be ridden on the road, and not over fences in the fields, and having got possession of the horse, lent it to a friend, who took it off the high road, and in the endeavor to jump it over a hedge killed it, the infant was held to have committed a wrong, and to be responsible in damages for the value of the horse. (*f*)

Exception.—Where fraud closely connected with a contract.

An infant, can not be made liable for a distinct fraud, if it to be closely connected with a contract. Thus, an action at law will not lie against a person for fraudulently representing himself of full age, and thereby inducing the plaintiff to contract with him. (*g*)

(*f*) Bernard v. Haggis, 4 C. B., N. S. 45 ; 32 L. J. 189, C. P.

(*g*) Price v. Hewitt, 8 Ex. 146 ; Liverpool Adelphi Loan Association v. Fairhurst, 9 Ex. 422 ; 23 L. J. 163, Ex. ; Bartlett v. Wells, 1 B. & S. 836 ; 31 L. J. 57, Q B.

CHAPTER XXX.

HUSBAND AND WIFE.

RULE 107. (*a*)—A husband and wife must be sued jointly for all torts committed by the wife either before marriage or during coverture.

A woman is liable for all torts committed by her as well before as after her marriage. If, that is to say, Y. assaults A., trespasses on his land, or defrauds him, she does not get rid of her liability by marriage with X.; nor is she free from responsibility for torts committed during coverture, whether they are committed by herself alone, or when acting together (*b*) with X. Though Y. during coverture can not be sued alone, and must be sued, if at all, together with X., yet when X. and Y. commit a joint tort, the plaintiff has the choice of either suing X. and Y. jointly, (which is in effect to bring an action against Y.) or of suing X. singly. But for what is merely the tort of the wife, whether committed before or after marriage, an action can not be brought against X. alone.

Torts founded on contract.—A married woman can not be made responsible for breaches of contracts made with her during coverture, by being sued for such breaches in the form of an action for tort. (*c*)

Exception.—Where fraud closely connected with a contract.

A woman is not liable either during coverture,
[477] or after her husband's death, to be sued for any fraud committed during coverture, which is so

(*a*) For the rule that a married woman cannot be sued alone during coverture, and the exceptions to it, see *ante*.

(*b*) Catterall v. Kenyon, 3 Q. B. 310.

(*c*) As to a married woman's incapacity of contracting, see *ante*.

closely connected with a contract as to form part of the same transaction. Thus, the question was raised, (*d*) whether an action would lie against a husband and wife for a false and fraudulent representation by the wife to the plaintiffs, that she was unmarried at the time of her signing a promissory note as a surety to them for a third person, whereby they were induced to advance money to that person, and it was held that the action was not maintainable. "A feme covert is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person as for any other personal wrong. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife can not be responsible, or the husband be sued for it together with his wife. If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture, for there is not a contract of any kind which a feme covert could make whilst she knew her husband to be alive, that could not be treated as a fraud; for every such contract would involve in itself a fraudulent representation of her capacity to contract." (*e*) Where, again, a married woman fraudulently represented to the plaintiff, that a bill was accepted by her husband, and thereby induced the plaintiff to discount it, the Court of Common Pleas were divided in opinion on the question, whether an action could be maintained against the wife and husband. (*f*)

Effect of death.—On the death of the husband [478] the wife remains liable (subject to the exception already mentioned) for all torts committed by her before

(*d*) Fairhurst v. Liverpool Loan Association, 9 Ex. 422; 23 L. J. 163, Ex.

(*e*) Ibid., 23 L. J. 164, 165, Ex. judgment of POLLOCK, C. B.

(*f*) Wright v. Leonard, 11 C. B., N. S. 258; 30 L. J. 365, C. P.; Johnston v. Pye, 1 Lev. 169; S. C., 1 Keb. 913; Cooper v. Withan, 1 Lev. 247; Cannam v. Farmer, 3 Exch. 698.

or after marriage. "As a general rule a married woman is answerable for her wrongful acts, including frauds, and she may be sued in respect of such acts jointly with her husband, or separately if she survives him. The liability is hers, though living with her husband; it must be enforced in an action against her and him, which to charge him must be brought to a conclusion during their joint lives." (*g*)

On the death of the wife the liability to be sued for her torts survives, if at all, against her representative; her husband is not liable for any tort committed by her. (*h*)

Effect of divorce.—A divorce leaves the wife liable, and frees the husband from responsibility for all torts committed by her. "I think a husband, after he has been divorced from his wife, is not liable for a tort committed by her during the coverture. . . . During the coverture the wife has in law no separate existence, and she can neither sue nor be sued in any court. For any wrong committed by her she is liable, but because she has no separate existence she can not be sued alone, and her husband must be joined with her. If the wife dies after an action has been commenced against her and her husband, the action abates; but if the husband dies, then the action goes on against her. It is clear, therefore, to my mind that the only reason why the husband is joined at all in such an action is from the disability of the wife to sue or be sued alone. But as soon as there has been a divorce à vinculo matrimonii, that disability ceases; she is in the same position as if she had never been married, and the husband ought no longer to be joined. [479] Where the marriage is not dissolved, but the parties are judicially separated, then it is necessary to make some provision for a state of things not recognized by the common law; for Head v. Briscoe (*i*) is an authority that for wrongs committed by the wife during coverture, the

(*g*) Wright v. Leonard, 30 L. J. 367, C. P., judgment of WILLES, J.
(*h*) Except, of course, torts which she may have committed as his agent.
(*i*) 5 C. & P. 484.

husband is jointly liable, even though they might be living entirely separate. This was done by the provisions of the 20 & 21 Vict. c. 85. . . . But there was no necessity to make any analogous provision for a dissolution of marriage for which the common law is sufficient." (*k*)

(*k*) Capel v. Powell, 34 L. J. 168, C. P., judgment of ERIE, C. J. For the effect of errors as regards joinder of parties in actions against husband and wife, see Rule 69, which applies, mutatis mutandis, to actions for tort.

CHAPTER XXXI.

BANKRUPT AND TRUSTEE.

RULE 108.—A bankrupt can be sued both before and after obtaining an order of discharge for all torts committed by him.

A discharge in bankruptcy is no defense to an action for tort. (*a*)

Torts founded on contract.—It is said that even where the plaintiff may at his choice sue either for breach of contract or in the form of an action for tort, the discharge is no bar to the action if he chooses to sue in the latter form, (*b*) unless, indeed, he has already proved for his claim, in which case he will be taken to have elected to waive the tort. (*c*)

It may be open to doubt whether the present Act, which in effect makes all claims proveable which are grounded on contract, may not make the order of discharge a bar to any claim which, in whatever form the action be brought, is substantially a claim for compensation for a breach of contract. (*d*)

(*a*) Bankruptcy Act, 1869, ss. 31 and 49.

(*b*) Parker v. Crole, 5 Bing. 63.

(*c*) Griffith & Holmes, Bankruptcy, 2nd ed., 964.

(*d*) Compare, as to things in action, Bankruptcy Act, 1869, ss. 4 and 22. The latter certainly suggests the idea that the Trustee must sue for all the bankrupt's things in action.

CHAPTER XXXII.

EXECUTORS AND ADMINISTRATORS.

RULE 109.—The personal representatives of the deceased (*i. e.*, his executors or administrators) can not be sued for torts committed by him.

The principle of the common law that an action for a wrong does not survive, applies as well to the liability to be sued as to the right to sue. This principle has, even as regards the liability of executors, &c., to be sued, been greatly modified by exceptions, but not to the same extent as in its application to their right to bring an action; and though the exceptions are nearly as extensive as the rule itself, they are themselves subject to limitations, which make it expedient, for the sake of clearness, to treat the common law principle as still forming the general rule, and to consider the modifications of it as exceptions.

If X. assaults, slanders, or libels A., or through his negligence kills A., and dies after committing these wrongs, no action can be brought against his representatives. So, again, if X. injures A.'s property, *e. g.*, converts or destroys his goods, or trespasses on his land, and dies more than six months after committing these wrongs, no action, at any rate in the form of an action for tort, can be brought against X.'s representatives.

Exception 1.—Injuries to property within 3 & 4 Will. IV. c. 42.

Under 3 & 4 Will. IV. c. 42, s. 2, actions may be brought against executors or administrators for any injury

to property, whether real or personal, committed
[482] by the testator or intestate within six months before his death. Thus, for example, if a testator or intestate takes coal from the plaintiff's land, and raises part of it within six months before his death, his executor or administrator is liable to be sued in trespass for so much as was raised within that period; (*a*) or should the deceased obstruct a watercourse, defraud the plaintiff, convert his goods, (*b*) or in any other way injure the plaintiff's property, the representatives of the wrong-doer will be liable to be sued, provided the wrong were committed within six months of his death. (*c*)

The action must be brought within six calendar months after the executors or administrators have taken upon themselves the administration of the estate and effects of the deceased; (*d*) and these six months date not from the death of the deceased, but from the time when the representatives have taken upon themselves the administration of his estate.

Exception 2.—Actions for dilapidations.

At common law, independently of any statute, an action may be brought for dilapidations against the executors of an ecclesiastical person by his successor. (*e*)

Exception 3.—Actions for tort brought in the form of actions on contract.

This is an exception in reality, but not in form.

In order to avoid the rule that actions for wrongs do not survive, actions were often brought in the form of actions for breach of contract, though in reality grounded on a tort. Thus, though an action on the custom of the

(*a*) Powel v. Rees, 7 A. & E. 426.
(*b*) Richmond v. Nicholson, 8 Scott, 134.
(*c*) See 2 Williams, Executors, 6th ed., 1602, 1603.
(*d*) 3 & 4 Will. IV. c. 42, s. 2.
(*e*) 2 Williams, Executors, 6th ed., 1603. See, as to a devastavit, 4 & 5 W. & M., c. 34, s. 12; 2 Williams, Executors, 6th ed., 1599.

realm against a common carrier was considered (*f*) to be an action for a tort, and therefore not to lie against a carrier's executors, an action for breach of the contract to carry safely, could be brought against them for the same cause. (*g*) [483]

(*f*) See *ante*.

(*g*) Powell v. Layton, 2 N. R. 370. See Cowp. 375. Collen v. Wright, 7 E. & B 301; 26 L. J. 147, Q. B.; 8 E. & B. 647; 27 L. J. 215, Q. B. (Ex. Ch.).

CHAPTER XXXIII.

EJECTMENT.

A.—PLAINTIFFS.

RULE 110.—The claimant (*a*) or plaintiff in ejectment must be a person who has the legal right to enter and take possession of the land, &c., in respect of which action is brought, as incident to some estate or interest therein. (*b*)

Nature of ejectment.—Ejectment is the action by means of which a person who is kept out of possession of land (or of corporeal hereditaments) (*d*) which he has a [485] right to enter upon or can have the wrongful pos-

(*a*) Claimant is the technical term for a plaintiff in ejectment. In explaining this and the following rules, the general term plaintiff is usually employed.

(*b*) See Cole, Ejectment, 65, 72. He adds the words "not barred or extinguished by the Statute of Limitations." As where a right is barred or extinguished it can not be strictly said to exist, these words are unnecessary for the purpose, at any rate, of the present rule.

(*d*) Cole, Ejectment, 72. Ejectment lies only for the recovery of certain kinds of property, viz., lands, tenements, or incorporeal hereditaments, the general rule being that "ejectment will lie to recover the possession of anything whereof the sheriff can deliver possession" (Selwyn, N. P., 13th ed., 627), and in strictness will (subject to some few exceptions) not lie for the recovery of any property whereon an entry can not be made (Ibid., 614, 615). It will, for example, lie to recover lands, houses, a part of a house, a coal mine, a salt pit, an orchard, a vestry, and so forth; but will not lie for a canonry, which is an ecclesiastical office only, or for things such as an advowson, a common in gross, which are not capable of being delivered in execution. Thus, while it has been held to lie for land covered with water, it has been held not to lie for a stream. (For these and other examples, see 1 Selwyn, N. P., 13th ed., 627, 628.) Though the decided cases mostly refer to the mode in which property should be described in the writ, they sufficiently establish the principle, that ejectment can only be brought for that kind of property, *e. g.*, houses, &c., of which the sheriff can give possession.

sessors turned out or ejected, and himself put into possession by the officers of the law.

Any person who has an estate in land (provided it is not an estate in remainder or in reversion) has, as one of the rights of property, a right to enter upon his land, or to enjoy the actual possession of it. Thus, suppose A. to be the owner in fee simple, or the tenant for life or for years, of a house, &c.; he has the right to enter into his house, and if X. occupies the house, and keeps A. out of possession, X. is, whatever the nature of A.'s estate, a wrong-doer. A., if he wishes to recover possession of his house, that is, to occupy it himself and turn X. out, can, if he chooses, simply enter and by his own hands, or those of his agents, turn X. out of the house; for A., who has, in the case supposed, a right to enter, and also a right to exclude X., can, if he choose, exercise his rights without requiring the intervention of the law. (*e*) But this course is exposed to several disadvantages, and can not be adopted where there is any doubt whatever as to the title of the person who wishes to recover possession. A.'s safest course is to bring an action of ejectment against X., the main object of which is to effect, by means of the sheriff and his officers, the same result which might have been directly effected by A. himself; viz., the putting A. into possession, and turning X. out of occupation. If A. succeeds in the action, this is exactly the result obtained, since, on a judgment in his favor, a writ is issued to the sheriff, commanding him to put A. into possession. A. must in order to succeed, show a good title, *i. e.*, a distinct right on his part to enter into the house and turn X. out of it; and can not succeed merely by showing that X. had no right to be in the house, for it is a fundamental principle in an [486] action of ejectment that the plaintiff must succeed on the strength of his own title, and not on the weakness of the defendant's. Hence ejectment raises the question of the plaintiff's title, but the action itself is, it must be borne in mind, a mere possessory action. If the plaintiff

(*e*) See Cole, Ejectment, 66–71.

succeeds, all that is necessarily proved is that he has a right to be put into possession, and if he fails it does not follow that the defendant has a right to possession either against all the world, or, at another time against the plaintiff himself. The defendant X., for example, may answer A.'s claim by showing that some third person, M., has a right to possession, and thus that neither X. nor A. have such a right.

An action of ejectment used to rest upon a series of legal fictions which it is not within the scope of this treatise to explain. (*f*) The modern action under the Common Law Procedure Act, 1852, is, in substance, the old action divested of the fictions on which it depended. It commences by the following writ, which combines to some extent the characteristics of a writ of summons and of a declaration, and serves to show who are the persons by and against whom the actions must be brought.

"Victoria, &c. To X., Y., and Z. [names of all the tenants in possession], and all persons (*h*) entitled to defend the possession of——, in the parish of——, in the county of ——, to the possession whereof A., B., and C., some or one of them, claim to be (or to have been on and since the ——day of ——, A.D. ——) entitled, and to [487] eject all other persons therefrom: these are to will and command you or such of you as deny the alleged title, within sixteen days after service hereof to appear in our Court of ——, to defend the said property, or such part thereof as you may be advised; in default whereof judgment may be signed, and you turned out of possession." (*i*)

Legal right.—The plaintiff or claimant in an action of ejectment must (*k*) have a legal right, and a legal title

(*f*) See, for an explanatton, 3 Steph., Com., 726; Cole, Ejectment, 1–3.

(*h*) These words refer to landlords, to whom the tenants in possession ought to give immediate notice when the writ is served (C. L. P. A. 1852, s. 206; Cole, Ejectment, 165), also to any other persons not known to the claimant to be in possession of any part of the property, but who may wish to appear and defend the action with leave of the court or a judge. Cole, Ejectment, 124, 701.

(*i*) C. L. P. Act, 1852, Sch. A., No. 13.

(*k*) See Rule 3.

is sufficient, notwithstanding that the defendant has an equitable title. (*l*) Hence, where the legal estate is vested in trustees, as where A. holds land in trust for M., the action should be brought in the name of A. (*m*) So if M. is a mortgagor, and A. a mortgagee, A.'s name should be used in suing X. If an action is brought by the trustee, A., a lease from the cestui que trust, M., can not be set up against the trustee in any case without the aid of a court of equity, (*n*) and an equitable defense can not be pleaded in ejectment. (*o*) As, generally speaking, a merely equitable title to the land is not sufficient to support an ejectment, (*p*) the person who has the legal estate, *e. g.*, a mortgagee, may often bring ejectment against the person who has the equitable estate, *e. g.*, the mortgagor. Thus, a mortgagor who remains in possession after the execution of a mortgage containing no proviso or stipulation amounting in law to a re-demise, is not considered as a tenant from year to year to the mortgagee, nor even as a tenant at will He is at most a tenant at sufferance, and may be treated either as [488] a tenant or as a trespasser, at the election of the mortgagee, who may maintain ejectment against him without any previous notice to quit, or demand of possession. (*q*) The question as to a mortgagee's right to bring ejectment against a mortgagor, or vice versâ, depends upon the interest left in the mortgagor. If he stands in the position of a tenant to the mortgagee, as he generally does, he can not be sued in ejectment until the tenancy be terminated by his default, or otherwise; (*r*) and if he be in the position of a tenant, he has the same right to

(*l*) Doe d. Hughes v. Jones, 9 M. & W. 372, 377; 1 Dowl. N. S. 352; Fenny d. Eastham v. Child, 2 M. & S. 255.

(*m*) It may, however, be convenient to join the name of X., which can be done in action of ejectment, see *post.*

(*n*) Baker v. Mellish, 10 Ves. 554; Doe d. Davies v. Evans, 9 M. & W. 48.

(*o*) Neave v. Avery, 16 C. B. 328; 24 L. J. 207, C. P.

(*p*) See Cole, Ejectment, 73.

(*q*) Cole, Ejectment, 462; and see Ibid., 462– 82, as to actions by mortgagee and by mortgagor.

(*r*) See C. L. P. Act, 1852, ss. 219, 220, for special provisions for the protection of mortgagors.

sue the mortgagee if the latter turns him out of possession, as every tenant has to sue his landlord if the latter dispossesses him during the tenancy, since the landlord does not, during the tenancy, possess the right of entry.

Though a merely equitable title is not sufficient to support ejectment, a title by estoppel will sometimes do as against a tenant or other person subject to the estoppel. (*s*) A cestui que trust, for example, may sometimes sue with success where the defendant, *e. g.*, as being his tenant, can not deny that the plaintiff has a legal right. (*t*)

Right of entry.—The right to enter into and take possession of the land is the foundation of an action of ejectment. Anything which shows that this right does not exist in the plaintiff is fatal to his success, and the plaintiff must further possess this right in virtue of, or incident to, some estate or interest.

The right must be a right to the actual possession of the property. A right to the rent is not sufficient, (*u*) the remedy in such case being by distress, (*x*) or an action for rent. (*y*) The right to enter must be imme-
[489] diate; that is to say, if A. lets land to B., he can not bring an action of ejectment against X. during the continuance of the tenancy. A reversion or future estate is not sufficient to support ejectment, unless coupled with some forfeiture or defeasance of the previous estate in possession. (*z*) But after the expiration of a term or other estate, the immediate remainder or reversion becomes an estate in possession, and will warrant an actual entry. A., for example, lets land to B., B.'s tenancy determines, and X. after this enters and takes possession, A. may then sue X. An outstanding term is therefore sufficient to defeat an action of ejectment, and even a mere tenancy from year to year, implied from proof of payment of rent,

(*s*) Doe d. Harvey v. Francis, 4 M. & W. 331; 7 D. P. C. 193
(*t*) Cole, Ejectment, 73.
(*u*) Doe d. Costa v. Wharton, 8 T. R. 2; Hill v. Saunders, 2 Bing. 112.
(*x*) Moss v. Gallimore, 1 Doug. 279.
(*y*) Voller v. Carter, 4 E. & B. 173.
(*z*) Doe d. Wilson v. Phillips, 2 Bing. 13; Doe d. Wilson v. Abel, 2 M. & S. 541.

and not shown to have been duly determined by a notice to quit or otherwise, is sufficient to defeat an ejectment, although the defendant does not pretend to derive any title through or under such tenants, or to defend on their behalf, (*a*) unless, indeed, he be estopped from setting up such outstanding tenancy. (*b*)

The plaintiff may claim in the writ to have been entitled on and since the —— day of ——; that is to say, he may claim to have had a right of entry, and therefore to have been injured by the defendant's keeping possession on and from any day prior to the issue of the writ which he chooses to name. The plaintiff gains some advantages by placing his title as early as possible, but the doing so involves this disadvantage, that if a plaintiff claim to have been entitled on and since a specified day, he must prove the right of possession to have been in him on that day, and thence until the commencement of the action, whereas the right of possession may have accrued after that date and before action brought, either by the expiration of a notice to quit or by a demand of possession, or from some other circumstance. (*c*) A. brings eject- [490] ment against X., his tenant, having given him notice to quit on the 1st of January such notice expiring, *e. g.*, on the 25th of March. Ejectment is brought on the 26th of March. If A. simply claims to be entitled, he will succeed, since he has a right to enter on the 26th. If he claims to be entitled on and from the first of January, he will fail, since he can not show a right of entry on that day. (*f*)

Plaintiff after entry remitted to his previous estate.—The plaintiff, on being put in possession of land, does not obtain any title other than that which he before possessed.

(*a*) Doe d. Wawn v. Horn, 3 M. & W. 333.

(*b*) See Cole, Ejectment, 288, 289. Compare the rules as to the person to bring trespass, *ante*.

(*c*) Cole, Ejectment 95, 95.

(*f*) Though an ejectment depends upon a right of entry, "an ejectment for non-payment of rent may sometimes be maintained under 15 & 16 Vict. c. 76 (Common Law Procedure Act, 1852), s. 210, where an entry without previous ejectment would not be lawful, no demand of payment having been duly made according to the provisions of the common law." Cole, Ejectment, 69.

He is remitted to his previous estate; that is to say, he becomes seized or possessed of the land for such an estate therein as was legally vested in him before and at the time of his entry. "If he has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor; and in respect of the freehold, his possession enures according to right. If he has no title, he is in as a trespasser, and, without any re-entry by the true owner, is liable to account for the profits." (*g*) His main advantage is, that on being lawfully in possession, he can put any other claimant who wishes to turn him out, to the proof of title on the claimant's part.

In applying the principle that a person in possession can put all others to the proof of their title, it is necessary to bear in mind the distinction between occupation and possession, and that the person relying on his rights as possessor, must be not only in occupation but in legal possession. If, for example, X. enters into the house of
[491] A. without any title, he can not, simply from his being in the house, claim the rights of a possessor. If the question is, which of two persons is in possession, that person must be considered to be so who has the title, or, in other words, the right to the possession. "If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of these two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser. They differ in no other respect. You can not say that it is a joint possession; you can not say it is a possession as tenants in common. It can not be denied that one is in possession, and the other is a trespasser. Then that is to be determined, as it seems to me, by the fact of the title, each having the same apparent actual possession. The question as to which of the two really is in possession is determined by the fact of the possession following the title; that is, by the law, which makes

(*g*) Taylor d. Atkyns v. Horde, 1 Burr. 114, per CURIAM; see **Doe d.** Daniel v. Woodroffe, 2 H. L. 811.

it follow the title." (*i*) If, again, X. has entered into occupation as the tenant or by the permission of A., he can not set up his possession against the claims of A.; since in such a case the possession of X. is the possession of A., who, in a legal point of view, has never been out of possession.

Particular persons who may bring ejectment.—As ejectment may be brought by any person legally entitled to enter upon land, it may be brought by partners, by a corporation, (*l*) by an infant (*m*) or an infant's guardian, (*n*) by a husband and wife, (*o*) by a bankrupt's trustee, (*p*) and by personal representatives. (*q*)

RULE 111.—All the claimants, or plaintiffs, [492] in whom the title is alleged to be, should join in bringing an action of ejectment.

All persons claiming to have a title giving them a right of entry, and on which therefore they can maintain ejectment, may and should join in the action, and a verdict will be given in favor of the claimant or claimants entitled to recover. (*r*) If, therefore, A., B., and C. sue X. in ejectment for the possession of a house and lands, there are various verdicts that may be given. A verdict may be given in favor of all of them or against all of them, or in favor of some of them, *e. g.*, A. and B., and against others; or a verdict may be given that either all or some of the claimants are entitled to some part only of the property claimed, *e. g.*, to the house but not to the

(*i*) Jones v. Chapman, 2 Exch. 820, 821, judgment of MAULE, J.
(*l*) 1 Selwyn, N. P., 13th ed., 624.
(*m*) Ibid.; Cole, Ejectment, 584, 585.
(*n*) Ibid., 583.
(*o*) Doe d. Hellings v. Bird, 11 East, 49.
(*p*) Bankruptcy Act, 1869, s. 415, and s. 22.
(*q*) See *post.*
(*r*) The Common Law Procedure Act, 1852, enacts "that the question at the trial shall . . . be whether the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled, nd whether to the whole or part, and if to part, then to which part of the roperty in question." Sect. 180.

land. The general rule as to co-owners, seems to be that they may either sue jointly and recover the whole of the property to which they are jointly entitled, or that one or more of them may sue without joining the rest, and recover his or their share or proportion of the whole property. (*s*)

Thus, in the case of partners, an action for ejectment for the recovery of real property belonging to the firm, ought to be brought in the name of all those persons in whom the legal estate is vested; and if one partner alone has the legal estate, he should bring the action in his own name, (*t*) and his title will not be affected by the circumstance of rent having been paid to the firm, and [493] receipts having been given all the partners. So if one partner only has made a lease of the partnership property, as his title can not be disputed by the lessee, ejectment may be maintained by him alone. (*u*) Executors stand in a peculiar position; they are for some purposes joint tenants, and for others tenants in common, and it seems that as the whole term and estate is vested in each executor, any one or more of them may (without the others) recover in ejectment the whole of the property. (*v*) But in all cases of doubt it is best to join every one who may be supposed to have a title, otherwise the defendant may succeed in the action, by setting up against the plaintiffs the better title of some person who has not joined. In actions of this description, persons can join who could not be joined in an ordinary action. Thus, if the legal estate is vested in trustees, but the action is brought by the cestui que trust, he should, if possible, first obtain their authority or consent to their names being used as plaintiffs; but if they unreasonably refuse, he should offer to idemnify them against the costs of the action, including the defendant's costs, and afterwards without their

(*s*) See Cole, Ejectment, 285, 286; C. L. P. Act, 1852, s. 180; and Day, C. L. P. Acts, 3rd ed., 148.

(*t*) Doe v. Baker, 2 B. Moore, 189.

(*u*) See Lindley, Partnership, 2nd ed., 482, 483.

(*v*) Doe d. Stace v. Wheeler, 15 M. & W. 624; Heath v. Chilton, 12 M. & W. 632; Cole, Ejectment, 534.

consent use their names together with his own as claimants. The trustees would not be able to discontinue or defeat such action without the leave of the court or a judge. (*x*) Such a joinder would, in the case of an ordinary action, be, it is conceived, a fatal error. (*y*)

Ejectment by one co-owner against another.—If land is owned by several persons jointly, or in common, *e. g.*, as joint tenants, tenants in common, &c., each is entitled to enter upon and occupy it, (*z*) and such occupation is no infringement upon the rights of his co-owners. Further, one co-owner of land who merely occupies the whole is not liable at law (or in equity) to pay rent to [494] the other owners; (*a*) but if one co-owner is actually excluded, or to use the technical term, "ousted" by the others, he can bring ejectment for his undivided share; (*b*) and, having recovered in ejectment, he can sue in trespass for mesne profits. (*c*)

B.—DEFENDANTS.

RULE 112.—The persons to be made defendants in an action of ejectment, *i. e.*, to be named in the writ, are all the tenants in possession of the land, &c., sought to be recovered.

The object of the plaintiff in ejectment being to turn out of possession the persons in actual possession of the land, whether they claim to possess by virtue of their own title or under the title of another, it is against them that he directly proceeds. They are the persons named in the

(*x*) Cole, Ejectment, 75.

(*y*) See *post*.

(*z*) Coke, Litt., 199 b; 1 Lindley, Partnership, 2nd ed., 70.

(*a*) Wheeler v. Horne, Willes, 208; McMahon v. Burchell, 2 Phill. 127; 1 Lindley, Partnership, 2nd ed., 70.

(*b*) Coke, Litt., 199 b, 200 a.

(*c*) Goodtitle v. Toombs, 3 Willes, 118; 1 Lindley, Partnership, 2nd ed., 70; Doe d. Hellings v. Bird, 11 East, 49; Doe v. Horn, 5 M. & W. 564 Compare, as to right of one co-owner to bring trover, *ante*.

writ, and upon them it must be served. (*d*) Suppose, for example, that A. claims land in the actual possession of X., who holds it as tenant for years of Y. It is against X. and not against Y. that A. directly proceeds, *i. e.*, X. is the person mentioned by name in the writ. So, again, if A. has let his land to Y., who has underlet it to X., and A. needs to recover possession, the person against whom he proceeds is the under-tenant X., and not Y. under whom X. holds.

The persons to be named in the writ are, therefore, all the tenants in possession, *i. e.*, every person who [495] occupies, as tenant or undertenant (or as owner) (*e*) any part of the property. (*f*) Even a lodger who has the exclusive use of certain rooms may, though it is not necessary or usual to do so, be joined as a defendant. On the other hand, mere friends and visitors of the tenant in possession, his wife, children, and servants, do not occupy as tenants, and therefore should not be included in the writ as defendants, *i. e.*, they are not in possession; for the occupation, *e. g.*, of a servant, is, in contemplation of law, the possession of his master, (*g*) though a servant may so act as to render himself personally liable to be sued in ejectment. (*h*)

RULE 113.—The persons who have a right to defend in an action of ejectment are any persons named in the writ, and any person who is in possession by himself or his tenant.

(*d*) C. L. P. Act. 1852, s. 170, provides a course of proceeding where the possession is vacant.

(*e*) The word tenant as used here may possibly cause some misunderstanding. Suppose that X., who claims to be the owner of the fee, also occupies his own land. He must be sued as being the tenant in possession.

(*f*) Cole, Ejectment, 75; Doe d. Smith v. Rowe, 5 Dowl. 254; Doe d. Williamson v. Rowe, 10 Moore, 493; Doe d. Darlington v. Cock, 4 B. & C. 259; Doe d. Turner v. Gee, 9 D. P. C. 612.

(*g*) Bertie v. Beaumont, 16 East, 33; Mayhew v. Suttle, 4 E. & B. 347

(*h*) Doe d. James v. Staunton, 1 Chit. 113; Doe d. Atkins v. Rowe, 2 Chit. 179; Cole, Ejectment, 76.

The object of the plaintiff in ejectment is to obtain, not damages, but possession of the land. He brings his action against the persons actually in possession, and if he succeeds, *e. g.*, through their letting judgment go by default, he turns them out and himself obtains possession. This may cause damage to a person, who owns but does not himself actually occupy the land, and is therefore not made a party to the action. A., for example, brings an action of ejectment against X. and Y., who are in the occupation of land as tenants of Z. from week to week; Z. is not made a party to the action, the [496] tenants let judgment go by default, and A. obtains possession. This is obviously an injury to Z., for he must, in order to regain possession, either enter and turn A. out, or, in his turn, bring an action of ejectment against A. But the injury may extend far beyond this, and Z. may be deprived of his property, for A. may have no title, and, therefore, Z. may be able if sued to resist his claim. But Z.'s own title may be defective, and if, therefore, he is once put out of possession by A., he may be unable to maintain successfully an action of ejectment against A., or in any way to recover possession of the land. In a case in which it was settled that a landlord has an absolute right to defend an action brought against his tenant, the importance of the right was thus pointed out by MARTIN, B. "But it was said, this is a matter of little importance, and the only consequence [of not allowing the landlord to defend] would be that a person abroad might be turned out of possession, and he might maintain an action of ejectment himself and recover possession. I apprehend a more mistaken view of the law could not possibly be submitted to the court. I apprehend that, probably, one half of the titles of persons in this kingdom depend on their being in possession. By the rule of law, the burden is cast upon the lessor of the plaintiff in ejectment of making out his title. And how many persons are there whose titles are perfectly unassailable? No person can meddle with or turn them out, because they would be utterly unable to do it by reason of defective evidence

and a variety of other matters that may impede the establishment of all rights; and so far from the circumstance of a person being turned out of possession being a matter of little importance, it is of the utmost importance to the security of landed property that persons should not be turned out of possession. unless some clear proof is given against them, upon which the person so claiming succeeds." (*k*)

[497] To ensure that all the persons interested in the defense shall have an opportunity of resisting the plaintiffs' claim, the law has given to two classes of persons a right to be defendants.

Persons named in the writ.—All the persons in actual occupation of the land claimed, must, as already pointed out, be named in the writ and made defendants. The persons so named, even if it happened that some of them ought not to have been named, have a right to defend; (*l*) and each of the persons so named must be served with the writ.

Persons not named in the writ.—Every tenant to whom a writ in ejectment is delivered, or to whose knowledge it comes, is bound under a heavy penalty forthwith to give notice thereof to his landlord, or his bailiff or receiver. (*m*) Security is thus provided, that the landlord shall know of any action of ejectment being brought to obtain possession of property in which he has an interest. But this is not in itself a sufficient protection; for though a defense by the tenant would be a good defense by the landlord, a landlord can not compel his tenants, on whom the writ is served, to appear and defend the action, or to allow him to do so in their names. (*n*) It is, therefore, enacted that, "Any other person not named in such writ, shall, by leave of the court or a judge, be allowed to appear and defend, on filing an affidavit showing that he is in possession of the land, either by himself or his ten-

(*k*) Butler v. Meredith, 24 L. J. 246, Ex., judgment of Martin, B.

(*l*) C. L. P. Act, 1852, s. 171; Cole, Ejectment, 123.

(*m*) Ibid., s. 209.

(*n*) Doe d. Turner v. Gee, 9 Dowl. 612; Right v. Wrong, Barnes, 173; Cole, Ejectment, 123.

ant." (*o*) Under this provision, any person has a right to defend (*p*) who can satisfy a judge that either he is himself in possession, or that his tenants are in possession. If the persons named in the writ wish to defend, the person not named is made co-defendant with them.
If, on the other hand, the persons named are not [498] willing to defend, the person applying for leave to defend is made defendant in their place. (*q*)

(*o*) C. L. P. Act, 1852, s. 172.

(*p*) See Butler v. Meredith, 11 Ex. 85 ; 24 L. J. 239, Ex.

(*q*) Under an earlier enactment (11 Geo. II., c. 19, s. 13), to the same effect it has been held that any one has a right to sue who claims a title consistent with the position of the occupier. Thus a mortgagee out of possession (Doe d. Tilyard v. Cooper, 8 T. R. 645 ; Doe d. Pearson v. Roe, 6 Bing. 613 ; an heir who has never been in possession (Doe d. Hiblethwaite v. Roe, 3 T. R. 783 n.), a devisee in trust in the same position (Lovelock v. Dancaster, 4 T. R. 122), the sublessee of boxes in a theatre (Croft v. Lumley, 4 E. & B. 608), have been allowed to come in and defend. But a cestui que trust who has never been in possession (Lovelock v. Dancaster, 4 T. R. 783), and a mere remainder-man (Whitworth v. Humphries, 5 H. & N. 185), have been refused leave to defend. See further, Day, C. L. P. Acts, 3rd ed. 143, 144

Trespass for mesne profits.—As in an action for ejectment no damages are recoverable except as between landlord and tenant under C. L. P. Act. 1852, s. 214, the law has provided a remedy, by way of supplement to the action of ejectment, in an action of trespass for mesne profits. In this action compensation may be recovered for the use and occupation of the property recovered in the ejectment during the period for which it was actually or constructively occupied by the defendant (Doe v. Harlow, 12 A. & E. 40 ; Doe v. Challis, 17 Q. B. 166), and also such compensation as the jury may give the plaintiff for his trouble under the circumstances proved before them, or for any damage done to the property by the defendant, and for the costs of the previous action of ejectment (Cole, Ejectment, 635). The plaintiff or plaintiffs in the action should be the claimant or claimants in the original action of ejectment.

The defendant or defendants should be the person, or all or any of the persons against whom the judgment was obtained in ejectment.

Any person may also be sued in an action under whom the tenants in possession held during the action, and to whom notice of ejectment was duly given under the C. L. P. Act, 1852, s. 209 ; or who, as landlord or otherwise, procured the tenants in possession to defend the ejectment, or to withhold the possession of the property from the claimant on demand made by him.

The action is maintainable against any person who, as under-tenant or otherwise, has occupied the property after judgment obtained in ejectment.

The action lies against personal representatives for mesne profits received by the deceased within six calendar months before his death (3 & 3 Will. 4, c. 42, s. 2). See generally as to this action, Cole, Ejectment, 637–638.

CHAPTER XXXIV.

NON-JOINDER AND MIS-JOINDER OF PARTIES, AND AMENDMENT.

RULE 114.—An action brought by a wrong plaintiff, or against a wrong defendant, must fail. (*a*)

If A. sues X. when B. ought to have sued X., or if X. is sued by A. when Y. ought to have been sued, the error is fatal. (*b*) For if a wrong plaintiff sues, or a wrong defendant is sued, either A., the plaintiff, is not the person whose rights have been invaded, or X., the defendant, is not the person who has invaded A.'s rights. It is, therefore, impossible for A. to establish against X. that interference with his rights which is the basis of an
[500] action. (*c*) This rule applies both to actions ex contractu and to actions ex delicto.

If the error appears on the pleading, it may be taken advantage of by demurrer, motion in arrest of judgment, or error. A. declares against X. on a contract, which on

(*a*) The errors which can be committed in respect of the parties to an action are of three kinds :—

1. The action may be brought in the name of the wrong plaintiff, or against the wrong defendant, *e. g.*, if A. sues X. when B. ought to have sued X., or if A. sues Y. when he ought to have sued X. ; or, what is exactly the same thing, if A. and B. sue X. when C. and D. ought to have sued, or if A. sues X. and Y. when he ought to have sued W. and Z.

2. The error may consist in a non-joinder of plaintiffs or of defendants, *i. e.*, an action may be brought by A. when it ought to have been brought by A. and B., or against X., when it ought to have been brought against X. and Y.

3. The error may consist of a mis-joinder of plaintiffs or defendants, *i. e.*, an action may be brought by A. and B. when it ought to have been brought by A., or against X. and Y., when it ought to have been brought against X.

(*b*) The two points to be considered in respect of every kind of error are first, what is the effect of the error if unamended? secondly, can it be amended?

(*c*) See *ante*.

the face of the declaration appears to be in point of law made, not with A., but with B. X. can, thereupon, demur, &c. If, on the other hand, the error appears at the trial, it gives rise to an adverse verdict or a non-suit. A. sues X. for the price of goods alleged to be sold by A. to X. It appears at the trial that they were sold, not by A., but by B. to X. There will, thereupon, either be a verdict for X., or else A. will be non-suited. In either case the action will fail.

Amendment.—This error can not be amended, for there is no power possessed either by the court or a judge to substitute a right for a wrong plaintiff or defendant. (*d*)

Apparent Exceptions.—There are some apparent exceptions to the general principle, here laid down. In an action, for instance, of ejectment by the cestui qui trust, the name of the trustee has been added. (*e*) The error in this case appeared at the trial, and the amendment consisted rather in the addition of a party than in the substitution of the right for the wrong plaintiff, and the action further was one of ejectment, in which it seems always to have been held that the court had specially wide powers of amendment. A landlord, again, may in an action of ejectment be allowed to defend, together with, or in place of the tenant in possession. But such landlord, though not mentioned by name in the writ, is in fact one of the parties to the action, being sued under the general description of one of the persons entitled to defend the possession.

Where, further, a foreign company sued in a corporate name, and the defendants pleaded that it was not a corporation, the court amended the writ and declaration, by inserting the name of a director as [501] nominal plaintiff, he being by the law of the foreign country entitled to sue. (*f*) This case, as well as that of Blake v. Done, (*g*) before referred to, has been explained

(*d*) Clay v. Oxford, L. R. 2 Ex. 55 ; 36 L. J. 15, Ex.
(*e*) Blake v. Done, 7 H. & N. 465 ; 31 L. J. 100, Ex.
(*f*) Banca Nazionale v. Hamburger, 2 H. & C. 330.
(*g*) 7 H. & N. 465 ; 31 L. J. 100, Ex.

on the ground that "persons not formally entitled to be parties . . . brought an action to try certain matters perfectly well known to both sides;" (*h*) and they may, perhaps, be considered instances rather of formal amendment than of the substitution of a right for a wrong plaintiff. The contrast between an amendment of this kind, and an amendment allowing representatives to be substituted as plaintiffs for a person dead at the time when the action was commenced, has been drawn out in the case in which the latter kind of amendment was applied for in the following judgment of BRAMWELL, B. "Here the plaintiff is altogether wrong, or rather, there is no plaintiff; the man in whose name the action was brought was dead. It can not be said that this was an amendment 'necessary for the purpose of determining in the existing suit the real question in controversy between the parties,' nor is this an application made between the parties to the suit; for there is no plaintiff, and, therefore, no existing suit, and no question in controversy between the parties. If we could see some person suing who had a beneficial interest in the claim made, though not legally entitled to sue, the case would be within the principle of the authorities cited. But the power of amendment is limited to cases where there was originally a party suing, possessed, though with a variety in legal description, of the same interest with the party to be substituted." (*i*)

[502] RULE 115.—In an action on contract;

1. A non-joinder of plaintiffs is, unless amended, a fatal error;

2. A mis-joinder of plaintiffs leads only to increased costs. (*k*)

(*h*) Clay v. Oxford, L. R. 2 Ex. 55, judgment of BRAMWELL, B.

(*i*) Ibid.

(*k*) Most of the errors in the choice of parties can be amended either before or at the trial under the C. L. P. Act, 1852, ss. 35–40, and C. L. P. Act, 1860. s. 19. The following points should be noted:—

1. Amendments should, except in one or two cases, be made by the court or a judge.

Non-joinder.—If A. sues where A. and B. ought to sue, the error, if it appears on the pleadings, gives rise to a demurrer, &c.; if it appears at the trial, gives rise to a non-suit, or adverse verdict. (*l*)

The reason of this is, that a contract by X. to pay A. and B. £20, gives a right to A. and B. jointly, but does not give a right to each of them. A contract, [503, in other words, to pay A. and B. is in itself a different obligation from the obligation to pay either A. or B., and, therefore, if A. alone sue, he can not by showing a contract to pay A. and B. prove the existence of an obligation to pay A. singly. The rule is, in fact, a rigid application of the principle, that no one can sue for anything which is not an infringement of his rights. A. and B. have a joint right to be paid a certain sum of money, and the neglect to pay it gives them together a right of action, but such neglect is not an interference with any right possessed by either of them singly. (*m*)

Amendment.—The non-joinder of plaintiffs can be amended either *before* or *at* the trial.

If the defendant pleads the non-joinder of the plaintiff

2. Amendments can be made before or at the trial that can not be made after verdict (Wickens v. Steel, 2 C. B., N. S., 488; Robson v. Doyle, 3 E. & B. 396). If a judge refuses to amend at the trial, the remedy is to apply to the court for a new trial (Whitwell v. Sheer, 8 A. & E. 301). The court will not interfere if the judge do not plainly appear to have been wrong (Sainsbury v. Matthews, 4 M. & W. 343), and perhaps can not interfere with the exercise at the trial of the discretion vested in him (Wilkin v. Reed, 15 C. B. 192; 23 L. J. 193, C. P.; Holden v. Ballantyne, 29 L. J. 149, 150, Q. B.).

3. The power to make amendments depends upon its appearimg that no injustice will be done by the amendments (C. L. P. Act, 1852, ss. 34, 35, 37). Hence, plaintiffs will not be added or struck out unless the persons to be so added or struck out consent, or unless, in the case of mis-joinder, the person to be struck out was originally introduced without his consent (Ibid., 34, 35). Hence, again, plaintiffs will not be struck out or added at the trial if it appear that they were originally added or omitted to gain some undue advantage (Ibid., 35).

4. C. L. P. Act, 1852, s. 222, and the analogous sections of the C. L. P. Acts, 1854 and 1860, do not (except, perhaps, in the case of ejectment, Blake v. Done, 7 H. & N. 465; 31 L. J. 100, Ex.) apply to amendments affecting the joinder of parties, Robson v. Doyle, 3 E. & B. 396; Wickens v. Steel, 2 C. B., N. S., 488; Wilkin v. Reed, 15 C. B. 192; 23 L. J. 193, C. P.

(*l*) Bullen, Pleadings, 3rd ed., 469.

(*m*) Compare Cabell v. Vaughan 1 Wms. Saund. 391 k, l, m. n.

in abatement, or at or before the time of pleading gives notice in writing (*n*) that he objects to such non-joinder, the plaintiff may amend without any order on payment of the costs occasioned by such amendment. (*o*)

The court or a judge may order a co-plaintiff to be joined, either before (*p*) or at (*q*) the trial; provided in the latter case that the defendant shall not have given notice that he objects to such non-joinder. (*r*)

Mis-joinder.—Where an action is brought by A. and B., which should be brought by A. alone, judgment may be given in favor of such one (or more) of them as are entitled to recover. (*s*) But the defendant, though unsuccessful, is entitled to any costs occasioned by the misjoinder. (*t*)

[504] The misjoinder is still fatal, as it would have been before the Common Law Procedure Act, 1852, if it is inconsistent with the cause of action alleged. A. and B. may, that is to say, join in suing when it may be supposed that the legal right existed in both of them, *e. g.*, when it is conceived that they were both members of a firm at the time when a contract sued upon was made with the firm, and if it turns out that B. was not a member at that time, judgment may be given in favor of A. alone. But they can not join in cases where the right can not be supposed to be in both of them, but where it is supposed to be in one or other of them. If, for example, A. is a bankrupt, and B. his trustee, and there is a

(*n*) C. L. P. Act, 1852, ss. 34–36.
(*o*) Ibid., s. 36.
(*p*) Ibid., s. 34.
(*q*) Ibid., s. 35.
(*r*) Ibid., s. 35.
(*s*) See Bremner v, Hull, L. R. 1 C. P. 748.
(*t*) C. L. P. Act, 1860, s. 19. "The joinder of too many plaintiffs shall not be fatal; but every action may be brought in the names of all the persons in whom the legal right may be supposed to exist, and judgment may be given in favor of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favor of such one or more of them as shall be adjudged by the court to be entitled to recover, provided always that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favor judgment is not given, unless otherwise ordered by the court or a judge."

doubt whether an action ought to be brought by A. or B., the difficulty can not be got over by suing in the names of A. and B., for it can not be that the legal right can be treated as existing both in the bankrupt and in his trustee, and that even in those cases where either the bankrupt or the trustee may sue. (*u*) Where a declaration alleged that the administrator of M., and B., sued X. for money payable by him to A., as administrator, and B.; for money paid by B. and M. in his lifetime; and for money lent by the administrator, &c., and B., it was held that the declaration was bad for misjoinder, and that the defect was not cured by the Common Law Procedure Act, 1860, s. 19. (*x*)

Thus, again, where an action was brought by an executor, together with a person who was not executor, and there were executors who were not joined, it was held (*y*) to be clear that the action was "not maintainable by the plaintiffs, or either of them, as executors—for this reason: one of the existing plaintiffs is not an [505] executor. If you leave him out, the other is an executor, yet not the only executor; and the plaintiff, by declaring in this way, may prevent the defendant from pleading in abatement, which otherwise she would be entitled to do. It could never have been the intention of the legislature when it says you may leave out one plaintiff, and give judgment for the other, that it should mean you may give judgment for one plaintiff, who might have been prevented from maintaining the action if he had been the sole plaintiff at first." (*z*)

In an action of ejectment, however, a trustee and a cestui que trust who can not have the legal right in both of them, can, as already pointed out, be joined as plaintiffs. The judgment will be given in favor of the trustee. (*a*)

The misjoinder of plaintiffs in actions ex contractu affects—

(*u*) See *ante*.
(*x*) Bellingham v. Clark, 1 B. & S. 332.
(*y*) Stubs v. Stubs, 31 L. J. 510, Ex.
(*z*) Stubs v. Stubs, 31 L. J. 513, Ex., judgment of BRAMWELL, **B.**
(*a*) See *ante*.

1st. *Set-off.*—The defendant can prove his set-off by showing that all the parties named as plaintiffs, *e. g.*, A., B., and C., are indebted to him, or by showing that the plaintiff or plaintiffs who can establish their right to maintain the action, *e. g.*, A. and B., are indebted to him. (*b*)

2ndly. *Second action.*—No other action can be brought against the defendant X. by any of the persons joined as plaintiffs in a former action, *e. g.*, by A. or B., &c., in respect of the same cause of action. (*c*)

Amendment.—The mis-joinder of a plaintiff can be amended by the Court, or a judge, either before or at the trial. (*d*)

[506] RULE 116.—In an action on contract;

1. A non-joinder of defendants gives rise to a plea in abatement;

2. A mis-joinder of defendants is, unless amended, fatal.

Non-joinder.—If an action is brought by A. against X., which ought to have been brought against X. and Y., the non-joinder of Y. can be pleaded in abatement; that is, X. can object to Y.'s not being joined. But the non-joinder of Y. is, if not pleaded in abatement, of no consequence; for if X. is sued for a breach of contract, his liability is proved by showing a contract made by X. and Y. (*e*) In other words, a contract by X. and Y. makes them liable to be sued separately, subject to the right of compelling the plaintiff by means of a plea in abatement to join the co-contractor as co-defendant.

The difference between the effect of the non-joinder of

(*b*) C. L. P. Act, 1860, s. 20.

(*c*) Ibid., s. 21.

(*d*) Ibid., 1852, ss. 34, 35.

(*e*) Whelpdale's Case, 5 Coke, 119 a; Richards v. Heather, 1 B. & Ald. 35; Rice v. Shute, 1 Smith, L. C., 6th ed. 511; Cabell v, Vaughan, 1 Wms. Saund. 291 b, 291 m.

plaintiffs and the non-joinder of defendants is clearly established, but it is not easy to account for it satisfactorily. The ground, perhaps, is that if X. and Y. undertake to pay £20 to A., each gives A. a right against him, and the contract can not fairly be considered to be an agreement that the one of them will pay only on condition that the other pays also. (*f*)

Amendment.—When the non-joinder is pleaded, the plaintiff is at liberty, without any order, to amend the writ and declaration, by adding the name of the person named in such plea, and may serve the amended writ upon the person so named, and proceed against the original defendant and the person named in the plea. (*g*)

When the non-joinder is not pleaded, the error [507] can not be amended. It is in general of no importance; but if of consequence at all, is fatal. Thus, where an action was brought against a husband alone for a debt incurred by his wife before marriage, the husband was held not liable, and it was further held that the Court had no power to add the wife as defendant, (*h*) and it appears clear that neither the court nor a judge have any power to remedy the non-joinder of a defendant.

Misjoinder.—If X. and Y. are sued where X. alone is liable, the error is fatal unless amended. If it appears on the pleadings, it gives rise to a demurrer, &c.; if it appears at the trial, to an adverse verdict, &c.

Amendment.—The mis-joinder of a defendant can be amended by the court or judge before or at the trial; (*i*) but will not be amended where the party wrongfully joined is made a co-defendant on purpose to try his liability.

(*f*) As to actions for torts founded on contract, see *post.*

(*g*) The Common Law Procedure Act, 1852, ss. 38, 39, contains provisions to secure that the defendant added be placed in as good a position as if the action had originally been commenced against him, and that the party whose negligence or error causes the amendment shall in any case pay the cost of it.

(*h*) Garrard v. Giubelei, 11 C. B., N. S. 616, 832; 31 L. J. 131, 270 C. P.

(*i*) C. L. P. Act, 1852, s. 37.

RULE 117.—In an action for tort;

1. A non-joinder of plaintiffs gives rise to a plea in abatement;

2. A mis-joinder of plaintiffs leads only to increased costs.

Non-joinder.—In an action by A. for tort, which ought to be brought by A. and B., the defendant can plead in abatement the non-joinder of B., or can give notice that he objects to such non-joinder. If he does not do so, the error is immaterial; (*k*) for if the defendant does not object to the non-joinder, he will be liable for such
[508] portion of the damages as was incurred by the plaintiff alone, though not for more. (*l*)

Amendment.—The rule is the same as in an action on contract. (*m*)

Mis-joinder.—The rule is the same as in an action on contract. (*n*)

RULE 118.—In an action for tort;

1. A non-joinder of defendants is no error;

2. A mis-joinder of defendants leads only to increased costs.

Non-joinder.—Each of several joint wrong-doers being separately liable for the whole damage caused by the joint wrong, it is no defense to X., when sued for a wrong, that Y., who is jointly liable, has not been sued with him. (*o*)

Amendment.—The non-joinder of defendants can not be amended, for it is not an error.

Mis-joinder—If X. and Y. are sued where X. alone ought to be sued, Y. is entitled to a verdict and his

(*k*) Bullen, Pleadings, 3rd ed., 708.
(*l*) Sedgworth v. Overend, 7 T. R. 279; Bloxam v. Hubbard, 5 East, 407.
(*m*) See *ante*. (*n*) See *ante*. (*o*) See *ante*

costs; but his being wrongly joined does not affect the liability of X., the real wrong-doer. (*p*)

Amendment.—The plaintiff may always remedy the error before the trial, by entering a nol. pros. as to the persons wrongly joined, *i. e.*, by dropping the action against them. The error can also be amended by the court or a judge before or at the trial, in like manner as the same error can be amended in an action on contract. (*q*)

Exception.—Actions for torts concerning real property.

"There is, it seems, a distinction between personal actions of tort and such actions when they concern real property. Therefore, if one tenant in common [509] only be sued in trespass, trover, or case, for any thing respecting the land held in common, he may plead the tenancy in abatement." (*r*)

Torts founded on contract.—The answer to the question whether an action brought in the form of an action ex delicto, as regards the rules for joinder of parties, is to be considered an action on contract or an action for tort. depends not upon the form, but upon the real character and substance of the particular action. Thus "where the action is substantially and necessarily founded on contract, the form of it in tort will not prevent the plaintiff being non-suited for the non-joinder of other persons interested." (*s*) But it must be borne in mind that, as already pointed out, differences of opinion exist as to the true character of certain actions. (*t*)

(*p*) Govett v. Radnidge, 3 East, 62; Bretherton v. Wood, 3 B. & B. 54; Pozzi v. Shipton, 8 A. & E. 963.

(*q*) See *ante*.

(*r*) Cabell v. Vaughan, 1 Wms. Saund. 291 *g*.

(*s*) Cabell v. Vaughan, 1 Wms. Saund. 291 *n*; and 291 *f*, note; Ansell v. Waterhouse, 6 M. & S. 385.

(*t*) See further, Bretherton v. Wood, 3 B. & B. 54; Pozzi v. Shipton, 8 A. & E. 693; Govett v. Radnidge, 3 East, 62; Ansell v. Waterhouse, 6 M. & S. 385; Powell v. Layton, 3 B. & P. 365.

SCHEME AS TO JOINDER OF PARTIES.

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a. Plaintiffs.

1. Non-joinder.—Fatal unless amended.
2. Mis-joinder.—Leads only to increased costs.

b. Defendants.

1. Non-joinder.—Gives rise to a plea in abatement.
2. Mis-joinder.—Fatal unless amended.

B. Actions for Tort.

a. Plaintiffs.

1. Non-joinder.—Gives rise to a plea in abatement.
2. Mis-joinder.—Leads only to increased costs.

b. Defendants.

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